

IN THE
Supreme Court of The United States

OCTOBER TERM, 1979

NO. **79-711**

STATE OF ALABAMA,

PETITIONER

VERSUS

JAMES G. DAVIS,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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The petitioner, the State of Alabama, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit

entered in this proceeding on June 13, 1979, rehearing having been denied on August 6, 1979.

OPINIONS OF THE COURTS BELOW

The decision of the Court of Criminal Appeals of Alabama affirming the respondent's appeal from his conviction for murder is reported as: Davis v. State, 53 Ala. App. 598, 302 So.2d 571 (1975). Certiorari was denied by the Supreme Court of Alabama on April 25, 1975 but is unreported. (R.Vol.I, p. 10) The denial of a subsequent petition for writ of error coram nobis was affirmed by the Court of Criminal Appeals of Alabama on February 18, 1975, but is unreported. (R.Vol.I, p.292)

The first order of the District Court denying the writ of habeas corpus is not reported, but was styled: Davis v. Alabama, C.A.75-A-0303NE (N.D.Ala. 1975) (Appendix A).

The decision and opinion of the United

States Court of Appeals for the Fifth Circuit affirming in part, reversing in part the above decision of the District Court is reported as follows: Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977), cert. denied 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977). (Appendix B)

The subsequent order of the District Court denying the writ of habeas corpus as to the issue which was remanded is not reported, but was styled: Davis v. Alabama, C.A. 75-A-0803NE (N.D.Ala. 1977). (Appendix C)

The decision and opinion of the United States Court of Appeals for the Fifth Circuit reversing and remanding for a further hearing is reported as follows: Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979). (Appendix D)

Rehearing and rehearing en banc were denied on August 6, 1979 (Appendix E).

JURISDICTION

The decision, opinion and judgment of the United States Court of Appeals for the Fifth Circuit was issued on June 13, 1979. A timely application for rehearing was denied by the said Court of Appeals on August 6, 1979 and this petition is filed within ninety (90) days of said date.

This Honorable Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. May federal courts, in exercising jurisdiction pursuant to 28 U.S.C. 2254, sua sponte decide issues not raised by the convict or his counsel?
2. To what extent may the error or omission of a defense lawyer - retained or appointed - be reviewed by the federal Writ of Habeas Corpus where there is no state action?
3. May the effectiveness of counsel be

judged by a standard other than "reasonably likely to render and rendering reasonably effective assistance"?

CONSTITUTIONAL PROVISIONS INVOLVED

A.

The Sixth Amendment to the Constitution of the United States, in particular the provision relating to the right to counsel:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

B.

The Fourteenth Amendment to the Constitution of the United States, Section One:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state

wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS INVOLVED

28 United States Code Section 2254, the same being submitted as Appendix "F" to this petition.

STATEMENT OF THE CASE

A.

Course of Proceedings and Disposition of Case in Court Below

Mr. Davis was indicted on November 2, 1973

for first degree murder. (R.Vol.I, p.48) He was lawfully convicted in the Circuit Court of Cullman County, Alabama on November 28, 1973. (R.Vol. I, p.63) Davis was sentenced to imprisonment in the state penitentiary for life. (R.Vol.I, p.64) He is presently on parole.

Davis' conviction was affirmed on appeal to the Court of Criminal Appeals of Alabama. Davis v. State, 53 Ala. App. 598, 302 So.2d 571 (1975). His Petition for Writ of Certiorari was denied by the Alabama Supreme Court on April 25, 1975. (R. Vol.I, p.10, unreported) The denial of a subsequent Petition for Writ of Error Coram Nobis was affirmed by the Court of Criminal Appeals of Alabama on February 18, 1975. (R.Vol.I, p. 292)

The instant proceedings were initiated when Mr. Davis filed this his third petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254 in federal district court. (R.Vol.I, p.2) On December 9, 1975, the Honorable C. W. Allgood, United

States District Judge, issued an order denying the present petition for habeas corpus filed by James G. Davis. (R.p.300) (Appendix A) Judge Allgood by order dated January 27, 1976 issued the certificate of probable cause. (R.Vol.I, p.305).

On January 14, 1977 the Court of Appeals for the Fifth Circuit affirmed in part, reversed in part. Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977). (Appendix B) This Honorable Court denied certiorari on those issues which had been affirmed by the Court of Appeals. 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977).

Pursuant to the order of the Court of Appeals this case was remanded to the district court to determine if denial of the continuance deprived petitioner of effective assistance of counsel. Davis, 545 F.2d at 467, supra. In compliance with the mandate of the Court of Appeals, an evidentiary hearing was held in the district court before Judge Nelson, the United States

Magistrate, on July 13, 1977. (R.Vol.II, p.1) On October 4, 1977 the petition for habeas corpus was granted by Judge C. W. Allgood. (R.Vol.I, p. 333) On the Court's own motion, the Judgment was stayed and on December 13, 1977 the petition was denied. (Appendix C) (R.Vol.I, pp.334-339) The certificate of probable cause was issued on January 12, 1978. (R.Vol.I, p.341)

On appeal the Court of Appeals affirmed the decision of the District Court in denying relief on the sole issue which had been remanded to the District Court. Nonetheless, the Court of Appeals held that Davis' counsel had been ineffective and remanded the case to the District Court to determine whether Davis had been prejudiced by the conduct of his attorneys. This decision of the Court of Appeals was issued on June 13, 1979 and is reported as Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979). (Appendix C) Petition for rehearing and rehearing en banc was denied on

August 6, 1979. (Appendix E)

B.

STATEMENT OF THE FACTS

On November 26, 1973, the first day of the state court trial, attorneys for Petitioner presented a Petition for Mental Examination and made an oral Motion for Continuance. (R.Vol.I, pp. 51, 73, 74) The court then held a joint hearing on both motions. (R.pp. 78-83) Although both the Petition and the Motion were reconsidered after a full hearing, both were ultimately denied. (R. Vol.I, pp. 83, 84) The denial of the Petition for Mental Examination has already been examined and affirmed. Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977), cert. denied 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977).

After the motion and petition were presented, Mr. Davis was questioned. He stated that a California court had sent him to see a Dr. Dean in May of 1972. (R.Vol.I, p.74) Davis explained

that he went to see Dr. Dean in order to meet the terms of probation on an assault and battery charge. (R.Vol.I, p.75)

Mr. Davis explained further that it was necessary for him to see Dr. Dean in order to satisfy requirements for the purpose of obtaining custody of his children. (R.Vol.I, p.76) He further stated that he and his wife had, in fact, been given approval of Dr. Dean and had obtained custody of the children. (R.Vol.I, p.76-77) Mr. Davis also testified that Dr. Dean had certified that Mr. Davis no longer needed treatment. (R. Vol.I, p.77)

Davis did state that he had a drinking problem. (R.Vol.I, p.77) He also admitted that he had many previous criminal arrests and convictions. (R.Vol.I, p.78). It should be noted that during both this hearing and the sentencing hearing Mr. Davis answered questions alertly and rationally. (R.Vol.I, pp.79, 257, 258) At no point

did his attorneys allege that he had been unable to help them in preparing his trial defense.

There was much testimony in both the hearing and at trial which brought out fully all the particulars of the report of Dr. Dean. (R.Vol.I, pp. 73, 76, 77, 200, 206, 207, 208).

After the denial of Motion for Continuance, the trial commenced under Davis' pleas of not guilty and not guilty by reason of insanity. (R. Vol.I, pp. 7, 84) There was testimony concerning the mental condition of Mr. Davis and defense attorneys were allowed to question state's witnesses, including the Alabama relatives of Mr. Davis, and a defense witness, about the mental condition of Mr. Davis. (R.Vol.I, pp.130, 194, 195, 198, 200, 202, 205, 207, 232, 280). Officer G. O. Buckelew stated that his investigation revealed that Davis had been treated for alcoholism in California. (R.Vol.I, p.200) This officer also testified that his investigation showed no mental problems,

except alcoholic problems, all the way through his report. Officer Buckelew also stated that a report written in February, 1973 stated that Dr. Dean did not consider the defendant to be in need of psychotherapy. (R.Vol.I, p.207, 208)

The state trial court judge very ably instructed the jury on all lesser included offenses in a first degree murder charge and on the plea of not guilty by reason of insanity. (R.Vol.I, pp.240, 241, 244-247) For a further summary of facts, see Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977), cert. denied 431 U.S. 957, 97 S.Ct. 53, L.Ed.2d 275 (1977).

REASONS FOR GRANTING THE WRIT

I.

IMPORTANT QUESTION OF FEDERAL JURISDICTION, PRACTICE AND PROCEDURE

THE COURTS BELOW HAVE SUA SPONTE DECIDED ISSUES NOT RAISED BY DAVIS THUS VIOLATING ACCEPTED STANDARDS OF FEDERAL JURISDICTION, PRACTICE AND PROCEDURE.

In both the majority and the dissenting opinions the Court of Appeals for the Fifth Circuit concluded that the denial, by the state trial court judge, of the motion for a continuance did not deprive Davis of effective assistance of counsel. Davis v. Alabama, 596 F.2d 1214, 1217, 1226 (5th Cir. 1979). It is clear, as stated in the dissenting opinion, "that was the only question remanded to the district court". Davis, 596 F.2d at 1228. It is equally clear that

such issue was the only issue raised by Davis which was not disposed of in the first appeal of this case. Davis v. Alabama, 545 F.2d 460, 466 (5th Cir. 1977). Yet, the majority, after disposing of this issue, proceeds to determine that Davis' trial attorneys were indeed ineffective and remands the case a second time for a hearing "on the single question of whether the attorneys' conduct prejudiced Davis". Davis, 596 F.2d at 1223.

In his dissenting opinion, Davis, 596 F.2d at 1226, 1228, Judge Skelton very ably states:

"We held that the contention of the petitioner in this regard raised a substantial claim of ineffective assistance of counsel, but it was tied to the action of the trial judge in denying the motion for continuance as shown by the remanded order. We did not decide this issue, but remanded the case to the district court

by issuing the following order:

'Accordingly, we remand this part of the complaint to the district court to determine if denial of the continuance deprived petitioner of effective assistance of his counsel.

'Affirmed in part, reversed in part.'

545 F.2d 467 . . .

. . . All of the members of the panel on this appeal agree that the trial judge is not to be faulted for denying the motion, and his action in that regard was proper. Accordingly, since the denial of the motion was proper, it could not and did not, as a matter of law, deprive the petitioner of the effective assistance of counsel. That was the only question remanded to the district court. It

has been answered by that court in the negative. The finding and conclusion of the district court, together with our view that the denial of the motion was proper, should end the matter."

The State of Alabama agrees that this holding should have ended this matter. Federal courts have long recognized that orderly judicial procedure normally precludes an appellant from raising on appeal issues not reasonably within the scope of the question presented for habeas corpus. Covington v. Harris, 419 F.2d 617 (D.C. 1969). The State of Alabama respectfully submits that more than orderly judicial procedure requires the federal courts to refrain from raising and deciding issues sua sponte. The action of the court below in deciding an issue not raised by Davis and not considered in its opinion before remand has clearly violated accepted standards of federal jurisdiction, practice and

procedure and presents an important federal question which should be decided by this Honorable Court.

II.

A NOVEL QUESTION

THE FEDERAL WRIT OF HABEAS CORPUS
SHOULD NOT BE AVAILABLE TO STATE
PRISONERS TO REVIEW MERE ERRORS OR
OMISSIONS BY DEFENSE ATTORNEYS
WHERE THERE IS NO STATE ACTION.

This Honorable Court has never directly addressed the question of whether Federal Habeas Corpus, under 28 U.S.C. 2254, is available to state prisoners whose claims of ineffective assistance of counsel are based on mere errors or omissions of their attorneys - retained or appointed - where there is no state action.

The petitioner recognizes the basic constitutional right of an indigent accused to have effective counsel. Competent counsel who are

licensed members of the bar must be appointed in a timely manner. However, at some point the state must relinquish control in order to protect and give credence to the attorney-client relationship. Absent "grossly deficient" behavior by counsel, there should be no further duty for state action. See Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1975), cert. denied 422 U.S. 1011, 45 L.Ed.2d 675, 95 S.Ct. 2636 (1975). "The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." American Bar Association Project for Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function §5.2(b) (tent. draft 1970).

The problems of using Habeas Corpus to review mere errors or omissions by defense attorneys

fall into two categories - practical and legal.

The legal problems arising from using habeas corpus to review alleged errors or omissions by defense counsel in state cases relate to the question of state action. The Court of Appeals for the Fifth Circuit has itself recognized that a mere error or omission of counsel is not actionable under 28 U.S.C. 2254 unless there is some state action involved. Fitzgerald; Malone v. Alabama, 514 F.2d 77 (5th Cir. 1975), cert. denied, 423 U.S. 990, 46 L.Ed.2d, 96 S.Ct. 403 (1976); Kallie v. Estelle, 515 F.2d 588 (5th Cir. 1975), 423 U.S. 1019, 46 L.Ed.2d, 96 S.Ct. 455 (1976). A private attorney - retained or appointed - is not a state official. He is not under the direct supervision of state officials. To provide such supervision it would be necessary for the State to somehow enter the confidential attorney-client relationship and to place restraints and mandates on private attorneys. Even if such procedure could pass constitutional muster, it would

totally undermine our adversary system of justice.

In the case sub judice the Court of Appeals has found no state action. Indeed, the trial court judge has been held blameless. In Davis v. Alabama, 596 F.2d at 1217 the Court of Appeals held:

Instead of blaming the judge we hold that Davis's trial attorneys were responsible for the inadequacy of Davis's defense.

Without regard to such finding, the Court of Appeals either presumed other state action or found none to be necessary and summarily decided under the standard of "reasonably likely to render and rendering reasonably effective assistance" that counsel was ineffective and remanded to the district court for a hearing to determine whether Davis was prejudiced by the conduct of his attorneys.

State action cannot be presumed. It must involve more than mere knowledge. If mere

knowledge were sufficient then every time state or local officials learned of a crime in progress, the crime would become state action. Clearly, state action requires as a condition precedent that the state or its officials be in a position to control events. Otherwise, the state would be at the mercy of persons and things beyond its control.

In Estelle v. Gamble, 429 U.S. 97, 50 L.Ed. 2d 251, 97 S.Ct. 798 (1976) this Honorable Court held that "medical malpractice does not become a constitutional violation merely because the victim is a prisoner". The State of Alabama submits that, by way of analogy, legal malpractice does not become a constitutional violation merely because the client is an accused absent some showing of state action.

The practical problems are numerous. The main difficulty is in identifying an error or omission at the time when something corrective

can be done. What appears to be an error or omission by counsel may be the result of a strategic decision or the result of a decision by the accused or simply a blunder.

This Honorable Court has recognized that what may appear to be errors, may in reality be tactical decisions. Estelle v. Williams, 425 U.S. 501, 48 L.Ed.2d 126, 96 S.Ct. 1691 (1976). Examples of this abound. For example, a failure of defense counsel to object to a confession may be an error or it may be the result of a strategic decision based on one or more of the following: (1) the accused has chosen not to testify; (2) the confession, while incriminating, puts the accused in a better light than the rest of the state's evidence; or (3) the confession is the accused's only opportunity to get his story before the jury. For another example, see Taylor v. State, 291 Ala. 756, 287 So.2d 901 (1973), cert. denied 416 U.S. 945, 40 L.Ed.2d 298, 94 S.Ct. 1955.

There are other practical problems. It is most difficult for trial judges and prosecutors to detect errors and sort them out from strategy and the demands of the accused. Since there is no time limit on habeas corpus, petitions may be filed years after the trial when defense attorneys may or may not recall why they did or did not do something. Other remedies are more timely.

This Honorable Court has recognized that there are Federal Questions for which habeas corpus is an inappropriate remedy. Stone v. Powell, 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976). The petitioner respectfully submits that questions relating to alleged errors of defense attorneys, where there is no state action, assuming that these are Federal Questions, are among the issues for which habeas corpus is not an appropriate remedy.

In order to suppress crime, criminal justice must be swift and certain. States must, however, accord accused persons due process of law.

If criminal justice is to be certain, the requirements of due process must be such that state officials can, by exercising reasonable diligence, follow them in every case. The State, because of the nature of our adversary system, cannot control all actions of defense attorneys. In the view of the Court of Appeals, tactical decisions of defense counsel arising from the attorney-client relationship can wipe out the diligent efforts of the legislature, judiciary and prosecutors to meet due process requirements. It is the duty of a defense attorney to avoid having a final conviction entered against his client. Why should a defense attorney work with diligence to protect his client's rights, when he can better serve his client by being negligent?

For all of the foregoing reasons, the State of Alabama respectfully submits that Federal Habeas Corpus under 28 U.S.C. 2254 should not be available to state prisoners to review mere errors

or omissions where there is no state action even when such issue is appropriately raised by a state prisoner.

III.

CONFLICT OF DECISIONS

THE EFFECTIVENESS OF COUNSEL SHOULD BE JUDGED BY THE STANDARD OF "REASONABLY LIKELY TO RENDER AND RENDERING REASONABLY EFFECTIVE ASSISTANCE".

Assuming for the sake of argument that the scope of review of the Court of Appeals was sufficiently broad to include the issue decided and that state action either was not necessary or was necessary and present, the Court of Appeals' holding that petitioner's counsel were ineffective is in conflict with Mackenna v. Ellis, 280 F.2d 592, (5th Cir. 1960), modified 289 F.2d 928 (5th Cir. 1961), cert. denied 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 1978 (1961). The standard of the Fifth Circuit by which the effective assistance

of counsel is to be determined is set forth at page 599 in MacKenna, as follows:

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

This standard has often received approval since that date. Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974); Haggard v. Alabama, 550 F.2d 1019, 1023 (5th Cir. 1977).

Furthermore, Judge Skelton in the dissenting opinion in Davis, 596 F.2d at 1230, points out:

"The 'effective assistance of counsel' cases relied on by the majority are distinguishable on the facts from the instant case. Those cases, without discussing them in detail, have, for the most part, a common characteristic

or thread running through them, namely, the fact that trial counsel conducted no investigation at all, or, more commonly, failed to investigate specific leads furnished by their clients that were germane to their defenses."

Among the cases cited by the majority are Hintz v. Beto, 379 F.2d 937 (5th Cir. 1967) in which trial counsel unlike counsel for Davis, raised absolutely no issue as to appellant's mental condition in any respect. In Greer v. Beto, 379 F.2d 923 (5th Cir. 1967) counsel failed to offer any testimony on the question of sanity.

In the instant case, unlike those cited by the majority, it is clear that defense counsel has done much more than, as the majority says, "put on only the shell of an insanity defense". Davis, 596 F.2d at 1215. The majority consistently refers to Davis' "relatives in California" and totally ignores the fact that many of Davis'

relatives resided in the Cullman area, were witnesses at the trial, and were, in fact, questioned by defense counsel with regard to the issue of insanity. (R.Vol.I, pp. 130, 194, 195, 198, 200, 202, 205, 207; R.Vol.II, pp. 27, 62, 63).

Judge Skelton in his dissent at page 1228 notes that Davis twice expressed satisfaction with his attorney's representation. The record shows that both defense counsel, unlike defense counsel in authorities cited by the majority, were very active in his defense. Evidence from the report of Dr. Dean was thoroughly considered at the state trial court level as there was much testimony in both the hearing and at trial which brought out his report. (R.Vol.I, pp. 73, 76, 77, 200, 206, 207, 208) The report indicated simply that Davis had been treated for alcoholism in California and that as of February 1973 Davis was no longer in need of psychotherapy. The record also reflects that Davis' attorneys cross-examined state's witnesses extensively.

Petitioner's present attorney did not claim at the evidentiary hearing nor did he claim in brief that petitioner's trial attorneys were at fault. (R.Vol.p. I 338). Before trial, defense counsel made numerous motions including a Petition for Mental Examination. (R.Vol.I, p. 51) They called Davis to the stand to testify during a hearing on this motion. (R.Vol.I, pp. 73-83) Davis' testimony at this hearing revealed only that he had been treated for problems relating to alcoholism and that he had, prior to coming to Alabama, been released from further treatment. (R.Vol.I, pp. 76-78) The denial of this Petition has been previously approved. Davis v. Alabama, 545 F.2d 460 (5th Cir. 1977), cert. denied 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977).

At the conclusion of the evidence, Davis' attorneys made arguments to the jury in his behalf on the issue of insanity. They requested written charges on the special plea not guilty by reason of insanity which were ably covered by the court

in its oral charge. (R.Vol.I, pp. 244-247) It is readily apparent that co-counsel could have done nothing more to be of effective assistance to their client.

Judge Skelton in the dissent at pages 1229 and 1230 also reaches this conclusion after cataloging the actions of trial counsel. In Davis, 596 F.2d at 1229, Judge Skelton writes:

"The foregoing efforts on the part of trial counsel show that they rendered reasonably effective assistance of counsel on the insanity issue, which seems to be the only issue troubling the majority. This is especially true in view of the holding of another panel of this court in the prior appeal, as quoted above, which is binding on us, that:

- (1) Petitioner had no history of irrational behavior.

- (2) Dr. Dean's report negated any suggestion of incompetency.
- (3) Lay witnesses testified he did not act irrationally or seem incoherent shortly after the crime and while confined in jail.
- (4) Petitioner's demeanor when he testified at the hearing on the § 425 motion showed he was able to recite with great particularity and understanding facts concerning his family and his criminal record. There was no indication of incompetency.
- (5) There was no evidence that he acted incompetently at his trial.
- (6) The trial court did not err in dismissing petitioner's habeas petition which called into

question his competency.

545 F.2d 464, 465.

The majority opinion unnecessarily expands and enlarges the doctrine of 'effective trial counsel.' A defendant is not entitled to 'errorless counsel', but only to counsel 'reasonably likely to render and rendering reasonably effective assistance.'"

When the actions of Davis' counsel are judged by the MacKenna standard of "reasonably likely to render and rendering reasonably effective assistance", it is certain that their actions, under the circumstances of the case sub judice, were more than sufficient to pass the test.

The State of Alabama submits that faced with defending a client who by all accounts was undeniably guilty of murdering his wife (Davis, 596 F.2d at 1215), defense counsel, in presenting a defense of not guilty by reason of insanity with knowledge which inevitably led to the conclusion that Davis'

troubles related only to the consumption of alcohol and that he had been certified as no longer needing treatment, discharged every duty owed to their client.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion, decision and judgment of the Honorable United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL

CAROL JEAN SMITH
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I, Carol Jean Smith, one of the attorneys for the Petitioner and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this _____ day of October, 1979, I did serve the requisite number of copies of the foregoing Petition for Writ of Certiorari on B. Don Hale, Esq. whose address is 316 2nd Ave., SW, Cullman, Alabama 35055, attorney for Respondent, by mailing said copies to him at the aforesaid address with first class postage prepaid.

CAROL JEAN SMITH
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

ADDRESS:

250 Administrative Building
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205-834-5150

Am

Supreme Court, U.S.
FILED

FEB 25 1980

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of The United States

OCTOBER TERM, 1979

NO. 79-711

STATE OF ALABAMA,

PETITIONER

VERSUS

JAMES G. DAVIS,

RESPONDENT

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES A. GRADDICK
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

NO. 79-711

STATE OF ALABAMA,

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JAMES G. DAVIS,

RESPONDENT

SUPPLEMENT TO PETITION FOR A WRIT OF

CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

In light of recent developments the
petitioner, the State of Alabama, pursuant to
Supreme Court Rule 24, respectfully prays that

the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit be granted, that the judgment of the United States Court of Appeals for the Fifth Circuit found at 596 F.2d 1214 (5th Cir. 1979) be vacated and that the cause be sent back for dismissal.

SUPPLEMENT TO OPINIONS OF THE COURTS BELOW
AND STATEMENT OF THE CASE

On January 7, 1980 the original petition for writ of habeas corpus was dismissed in the United States District Court for the Northern District of Alabama, Northeastern Division.

(Appendix G)

REASONS FOR GRANTING WRIT, VACATING
JUDGMENT BELOW AND MANDATING DISMISSAL

In support of its supplemental prayer, petitioner, the State of Alabama, shows unto this Honorable Court the following:

1. On November 2, 1979 a timely petition for writ of certiorari was filed in this Honorable

Court.

2. On January 2, 1980 this Honorable Court directed B. Don Hale, Esq. to file a response.

3. On January 7, 1980 the original petition for writ of habeas corpus was dismissed in the United States District Court for the Northern District of Alabama, Northeastern Division upon motion of the petitioner. (Appendix G) Both the State of Alabama and B. Don Hale, Esq. were without knowledge of the filing of such motion. The State of Alabama has now been informed that such motion was filed by J. Foster Clark, Esq., court-appointed counsel.

4. The judgment of the United States Court of Appeals for the Fifth Circuit in Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979) should not be allowed to stand against the State of Alabama. United States v. Munsingwear, 340 U.S. 36 (1950).

CONCLUSION

For the foregoing reasons, the State of Alabama respectfully prays that this Honorable Court grant the petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit, vacate the judgment of the Fifth Circuit in Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979) and mandate dismissal of this cause.

Respectfully submitted,

CHARLES A. GRADDICK
ATTORNEY GENERAL
BY-

CAROL JEAN SMITH
ASSISTANT ATTORNEY GENERAL
COUNSEL FOR PETITIONER

ADDRESS OF COUNSEL:

250 Administrative Building
64 N. Union Street
Montgomery, Alabama 36130
205-834-5150

CERTIFICATE OF SERVICE

I, Carol Jean Smith, one of the attorneys for Petitioner and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this ____ day of February, 1980 I did serve the requisite number of copies of the foregoing Supplement to the Petition for Writ of Certiorari on B. Don Hale, Esq. whose address is 316 2nd Ave., SW, Cullman, Alabama 35055, previous attorney for the Respondent, and on J. Foster Clark, Esq., whose address is 600 N. 18th St., P. O. Box 306, Birmingham, Alabama 35203, present attorney for Respondent, and on the Clerk of the United States District Court for the Northern District of Alabama, Federal Courthouse, Birmingham, Alabama 35203, by mailing said copies to them at the aforesaid addresses with first class postage prepaid.

CAROL JEAN SMITH
ASSISTANT ATTORNEY GENERAL

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JAMES G. DAVIS,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

NO. CA 75-A-0803-NE

O R D E R

On motion of petitioner and for good cause shown, it is hereby ORDERED that the writ for petition of habeas corpus be and the same hereby is DISMISSED.

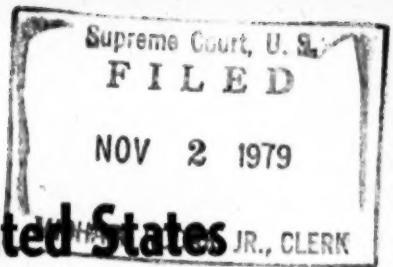
DONE this 7th day of January, 1980.

/s/ C. W. Allgood
CLARENCE W. ALLGOOD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

APPENDIX G

Supreme Court of the United States

IN THE



OCTOBER TERM, 1979

NO. 79-711

STATE OF ALABAMA,

PETITIONER

VERSUS

JAMES G. DAVIS,

RESPONDENT

**APPENDICES TO PETITION
FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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COUNSEL FOR PETITIONER

APPENDIX A
IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JAMES G. DAVIS,)	
Petitioner)	
-Vs-)	NO. CA 75-A-0803-NE
STATE OF ALABAMA,)	
Respondent)	

ORDER

The Court has considered the pleading filed by petitioner in this cause, the response of the State of Alabama to a show cause order heretofore entered by the magistrate and the report and recommendation of the U.S. Magistrate. The magistrate's recommendation is hereby ADOPTED and APPROVED.

It is therefore ORDERED that the petition for habeas corpus filed by James G. Davis be and the same hereby is DENIED.

The Clerk is directed to furnish petitioner and the Hon. William Baxley, Attorney General of the State of Alabama with a copy of the magistrate's report and recommendation and this Order.

DONE, this 9th day of December, 1975.

C. W. ALLGOOD

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JAMES G. DAVIS,)
 Petitioner)
-Vs-) NO. CA 75-A-0803-NE
STATE OF ALABAMA,)
 Respondent)

EXAMINATION, REPORT AND RECOMMENDATION

On November 28, 1973, petitioner Davis was convicted of murder in the first degree in the Circuit Court of Cullman County, Alabama and sentenced to life imprisonment. The indictment on which he was tried charged the murder of Marsha Lee Davis, wife of the petitioner, with a shotgun. To the charge, Davis entered pleas of not guilty and not guilty by reason of insanity and on the date of the trial, filed a written motion by which he requested the trial court to "institute a careful investigation . . . with the view of determining the mental condition of the defendant and the existence of any mental disease or defect which would affect his present criminal responsibility, or his criminal responsibility at the time of the commission of the alleged crime, all in accordance with Section 425, Title 15, Code of Alabama (1940) as amended." On appeal to the Alabama Court of Criminal Appeals, it was asserted that the trial court's rejection of his request for an investigation into his criminal responsibility deprived him of due process under the Fourteenth Amendment. The conviction was affirmed with the appeals court finding that there had not been a

sufficient showing before the trial court to require such an investigation. Being indigent, Davis was represented at all critical stages of the proceedings by two court-appointed lawyers. Davis next returned to the trial court, *pro se*, with a petition for a writ of error coram nobis where he alleged a denial of due process in the court's refusal to grant a continuance in the trial so that his counsel might prepare to prove his defense of insanity at the time of the alleged crime and for the first time, clearly raised the issue of his competency at the time of the trial itself. That petition was dismissed without hearing on November 8, 1974. The Court of Appeals affirmed and the Supreme Court of Alabama and the Supreme Court of Alabama denied certiorari. There then followed this petition for Federal habeas corpus relief where Davis again claims denial of due process in the court's refusal to grant a continuance and to order a hearing into his competency to stand trial.

The written motion filed by Davis' counsel on the date of trial alleged that in their opinion, he needed psychiatric evaluation and that he had previously been ordered to undergo psychiatric treatment by a court in Los Angeles, California. In support of the motion, there was produced, a copy of a probation report from the California court which contained a letter from one Doctor Dean which indicated that both Davis and his deceased wife had been consulted by him and that Davis' drinking problem had improved somewhat during such consultation. Testifying in his own behalf on the motion, Davis stated that the California court had placed him on probation after his conviction for assaulting the deceased and that his real problem was related to his abuse of alcohol.

Without doubt, the conviction of a defendant while he is legally incompetent violates due process, *Bishop v. U. S.*, 350 U.S. 961 (1956); *Pate v. Robinson*, 383 U.S. 375 (1966). Due process requires that at any time the trial court has

reasonable ground to doubt the present competency of the defendant, that such court must take reasonable steps to assure that his competency is legally determined, *Seibold v. Daniels*, 337 F.Supp. 210 (1972) and the state cannot rely on a defendant's failure to raise such issue at trial for it is contradictory to argue that a defendant may be incompetent and yet knowingly waive his right to such determination. *Pate v. Robinson, supra*.

Alabama has sought by statute to insure that defendants in its courts will have their rights protected in this regard. Section 425 of Title 15, Alabama Code, 1940 (recompiled 1948) provides in pertinent part as follows:

Whenever it shall be made known to the presiding judge of a court by which an indictment has been returned against a defendant for a capital offense . . . that there is reasonable ground to believe that such defendant was insane either, at the time of the commission of such offense, or presently, it shall be the duty of the presiding judge to forthwith order that such defendant be delivered by the sheriff of the county to the superintendent of the Alabama state hospitals . . . with the view of determining the mental condition of such defendant and the existence of any mental disease or defect which would affect his present criminal responsibility, or his criminal responsibility at the time of the commission of the crime.

While on the face of it, this Code Section appears to mandate an inquiry into a defendant's "mental condition" at any time the court has "reasonable ground to believe that such defendant was insane" the United States Court of Appeals has interpreted such statute to direct an inquiry into the defendant's mental state at the time of the commission of the offense. In *Lee v. State of Alabama*, 386

F.2d 97 (1967), the court said:

Although this section speaks of the "mental condition" of the accused it seems clearly directed towards the specific inquiry whether an indicted person suffered from any mental disease or defect which would affect his *present criminal responsibility or his criminal responsibility at the time of the commission of the crime*. It is plain that this section does not expressly require any determination by the lunacy commission as to the mental capacity of the accused person, already under indictment in a capital case *to stand trial*.

On the other hand, the Fifth Circuit is clear in *Lee, supra*, to the opinion that Title 15, Section 426 is expressly directed at the question of a defendant's ability to stand trial and that it contemplates the use of a separate jury to determine such question. That section provides in pertinent part as follows:

If any person charged with any felony be held in confinement under indictment, and the trial court shall have reasonable ground to doubt his sanity, the trial of such person for such offense shall be suspended until the jury shall inquire into the fact of such sanity . . . If they find that he is insane at that time, the court shall make an order committing him to the Alabama state hospitals, where he must remain until he is restored to his right mind. When the superintendent of the hospitals shall be of the opinion that such person is so restored . . . such person must be remanded to prison on an order of such judge, and the criminal proceedings resumed.

It is clear that the written motion filed by Davis was one seeking relief under Title 15, Section 25. Indeed the

request for relief tracked the language of that section and was directed to Davis' defense of insanity, i.e., whether at the time of the commission of the offense, Davis understood the difference between right and wrong and was capable of choosing the right over the wrong. At no time did Davis raise the question of his then competency to stand trial, i.e., was he able to understand the charges against him and to assist in his own defense. This is not to say that the state can now rely on his failure to raise such issue for as we have seen from *Pate, supra*, that would be a contradictory position. The question which must be decided here is whether based on Davis' Section 425 motion and the evidence presented on it, the trial court should have *sua sponte*, considered that it had a Section 426 motion before it and proceeded accordingly. Again, the Fifth Circuit Court of Appeals has spoken to the duty of the Alabama trial court when faced with a Section 426 motion, *Brinks v. Alabama*, 465 F.2d 446, 5th Cir. 1972.

Before the trial judge suspends the normal course of criminal proceedings and conducts a jury inquiry into the fact of sanity, there must come to his attention, factual data, or allegations of factual data, tending to show "reasonable ground to doubt (the accused's) sanity." The court has discretion to determine if the underlying factual basis said to exist does in fact exist, and whether such factual basis constitutes "reasonable ground to doubt (the accused's) sanity." If that standard is attained, discretion drops out of the picture — that is, the judge has no discretion to disobey the mandate of the statute if the prerequisites for the mandate are present.

Here, the evidence of Davis' mental state was minimal at best. It consisted of a probation report which contained a letter from a doctor who was variously described by Davis

as either a psychiatrist or a psychologist. The report indicated counseling with both Davis and his wife and that the consultation may have concerned excessive use of alcohol by Davis. Further, Davis testified himself, that his problems were in large part related to alcohol and its use. On such slim evidence, Davis wants this Court, which has nothing more than a cold written record, to find that a judge in the Alabama state court which had before it the defendant; which heard his testimony, which observed his demeanor and lucidity on the stand; and which was a part of the actual proceedings, abused his discretion in refusing to halt the trial of a first degree murder indictment on his own motion and impanel a separate jury for the purpose of inquiring into Davis' then competency to understand the charges against him and to assist his lawyers in his own defense. It is the opinion of the magistrate that it would be improper for this Court to substitute its judgment for that of the Alabama state court absent compelling evidence of incompetency on the part of Davis. Such evidence is not apparent in the record before this Court.

As to Davis' claim that the court abused its discretion in refusing to grant a continuance so that his trial counsel could prepare to prove the defense of insanity, it is difficult to see such an abuse amounting to constitutional proportions where there was so little which could apparently be gained by such a delay. Further, it is apparent from the record that defense counsel had known of the need to prepare themselves for several weeks. Accordingly, the magistrate is of the opinion that there was no abuse of the trial court's discretion.

For the reasons stated above, it is the recommendation of the magistrate that no evidentiary hearing be held in this matter and that the petition for habeas corpus relief be denied.

DATED, this 9th day of December, 1975.

EDWIN L. NELSON
United States Magistrate

APPENDIX B

James G. DAVIS, Petitioner-Appellant,

v.

STATE OF ALABAMA, Respondent-Appellee.

No. 76-1273.

**UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.**

Jan. 14, 1977.

The United States District Court for the Northern District of Alabama, Clarence W. Allgood, Senior District Judge, denied petition for habeas corpus relief without holding evidentiary hearing, and petitioner appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that petitioner did not raise issue of competency at trial; that bona fide doubt as to petitioner's allegations in support of his habeas corpus petition that he was incompetent to stand trial were insufficient to require evidentiary hearing; but that in light of defense counsels' repeated assertions that they did not have time to prepare adequate defense and weak defense that they in fact presented, petitioner's claim concerning failure of trial court to grant counsels' motion for continuance to better prepare themselves to defend petitioner would be remanded for hearing to determine if denial of continuance deprived petitioner of effective assistance of counsel.

Affirmed in part, reversed in part.

1. Constitutional Law § 268.2(2)

Trial of accused while he is incompetent violates the due process. U.S.C.A. Const. Amend. 5.

2. Constitutional Law § 268.2(2)

Essential to claim that trial court violated defendant's procedural due process rights by not determining his

competence at time of trial is showing that defendant presented evidence raising issue of competency.

3. Criminal Law § 625

Explicitly worded motion for competency hearing is not only signal to trigger procedures that provide for determination of competency; rather, if defendant has presented evidence to trial court, before or during trial, that raises "bona fide doubt" of his competence, trial court's failure to make further inquiry denies that defendant his constitutional right to a fair trial.

4. Criminal Law § 625

Where defense never explicitly raised issue of competency either prior to or during trial, and remarks of both trial judge and defense counsel made clear that all parties understood motion for mental examination to be directed toward obtaining evidence relevant to petitioner's substantive defense of insanity, petitioner did not raise issue of competency in his state court prosecution. Code of Ala., Tit. 15, § 425.

5. Constitutional Law § 268.2(2)

Where petitioner had no history of irrational behavior, psychologist's report negated any suggestion of incompetency that might have been inferred from fact of his treatment, lay witnesses testified that petitioner did not act irrationally or seem incoherent shortly after crime and during his pretrial confinement, and petitioner's demeanor indicated no incompetence on his part, bona fide doubt as to petitioner's competence did not exist at petitioner's state court trial and trial court's failure to, sua sponte, conduct competency hearing was not a violation of petitioner's due process rights. U.S.C.A. Const. Amend. 5.

6. Habeas Corpus § 25.1(4)

Although petitioner could not argue that state trial court's failure to invoke appropriate procedures to

determine his competency violated his rights to due process where no bona fide doubt as to competency was raised at trial, petitioner still could prevail if, at habeas, he could show that he nevertheless was incompetent to stand trial. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 5.

7. Habeas Corpus § 59

Petitioner's demeanor, testimony of lay witnesses that petitioner did not act irrationally or seem incoherent shortly after crime and during his pretrial confinement, and clinical psychologist's report, which merely recorded essence of interview with petitioner concerning his history of domestic problems, which did not address issue of petitioner's present or past competency, and which even accepted as true, did not raise real, substantial and legitimate doubt as to petitioner's competency, were insufficient to require evidentiary hearing on petition for habeas corpus, at least insofar as petition called into question petitioner's competency at his state court trial. 28 U.S.C.A. § 2254.

8. Habeas Corpus § 45.2(4)

Denial of motion pursuant to Alabama statute for mental examination of petitioner, who was convicted in state court of first-degree murder and was seeking habeas corpus relief but who cited no relevant authority that required, as constitutionally mandated, any procedure to determine criminal responsibility similar to that provided for by Alabama statute, was in accord with relevant state law and violated no federal constitutional right. 28 U.S.C.A. § 2254; Code of Ala., Tit. 15, § 425.

9. Criminal Law § 586

Matter of continuance is traditionally within discretion of trial court and not every denial of such a motion violates one's due process rights or renders ineffective assistance of counsel. U.S.C.A. Const. Amends. 5, 6.

10. Habeas Corpus § 113(13)

On the basis of particular facts, including defense counsel's repeated assertions that they had not had time to prepare a defense and failure to produce medical or psychiatric testimony in support of insanity defense, petitioner raised substantial claim of ineffective assistance of counsel in state court trial and, since no full and fair hearing had been held in state court, habeas corpus proceeding would be remanded for hearing to determine if trial court's denial of continuance deprived petitioner of effective assistance of counsel. U.S.C.A. Const. Amend. 6.

James G. Davis, pro se.

George G. Lynn (Court-appointed), Birmingham, Ala., for petitioner-appellant.

William J. Baxley, Atty. Gen., Carol Jean Smith, Asst. Atty. Gen., Montgomery, Ala., for respondent-appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before RIVES,* GEWIN and MORGAN, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

Petitioner James G. Davis appeals the denial of his petition for habeas corpus relief, sought pursuant to 28 U.S.C. § 2254, by the United States District Court for the Northern District of Alabama. The Circuit Court of Cullman County, Alabama convicted Davis of first degree murder on November 26, 1973. After exhausting his state

*Judge Rives was a member of the panel that heard oral argument but due to illness did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

remedies,¹ Davis filed the present petition² with the district court. Adopting the report of the United States Magistrate and holding no evidentiary hearing, the district court dismissed the petition.

On November 26, 1973, the day that Davis' trial was set to begin, his attorneys moved, pursuant to Ala. Code tit. 15, § 425,³ for a mental examination of the defendant.⁴ At the hearing on the motion, defense attorneys informed the court that they had learned a month before that defendant had undergone some psychiatric treatment in California in May of 1972; according to the statements of the attorneys at the hearing, this information, alone, prompted the § 425

¹The Criminal Court of Appeals of Alabama affirmed Davis' conviction on October 1, 1974. On November 8, 1974, the trial court denied a petition for *coram nobis*; the criminal court of appeals likewise affirmed this judgment on February 18, 1975. Finally, on April 24, 1975, the Alabama Supreme Court denied petitioner's writ of certiorari.

²The present petition represents defendant's third effort to obtain habeas relief. The district court dismissed his first petition on December 20, 1974 and his second petition on June 11, 1975.

³Section 425 provides in pertinent part:

Whenever it shall be made known to the presiding judge of a court by which an indictment has been returned against a defendant for a capital offense, by the written report of not less than three reputable specialist practitioners in mental and nervous diseases, appointed by the judge, or by the written report of the superintendent of the Alabama state hospitals, that there is reasonable ground to believe that such defendant was insane either, at the time of the commission of such offense, or presently, it shall be the duty of the presiding judge to forthwith order that such defendant be delivered by the sheriff of the county to the superintendent of the Alabama state hospitals, who is charged with the duty of placing such defendant under the observation and examination of himself and two members of his medical staff to be named by him, constituting a commission on lunacy, with the view of determining the mental condition of such defendant and the existence of any mental disease or defect which would affect his present criminal responsibility, or his criminal responsibility at the time of the commission of the crime.

⁴Davis had previously entered a plea of Not Guilty and Not Guilty by Reason of Insanity.

motion. Besides the testimony of the defendant, the only evidence presented at the hearing related to the California treatment was a probation report from a Dr. Dean, a psychologist⁵ who had treated defendant. According to defendant's testimony, a California court required, as a condition of defendant's probation on an assault and battery conviction, that defendant see Dr. Dean. In addition, according to defendant,⁶ the local welfare department, which had removed defendant's children from his and his wife's custody, stated that they would return the children only upon a satisfactory report from Dr. Dean.⁷ Dr. Dean's report to the probation department merely stated that he had evaluated defendant's behavior and determined that he and his wife were living together harmoniously and that Davis had decreased his drinking.⁸ Upon Dr. Dean's recommendation that Davis no longer needed treatment, he and his wife again received custody of their children.⁹ After hearing the above evidence, the trial court denied the § 425 motion, noting that this evidence was insufficient to require a § 425 mental examination.¹⁰ Defense counsel then requested a continuance so that they could gather more evidence to aid in their preparation of Davis' insanity defense; the trial court likewise denied this motion.

⁵Throughout the record of the hearing, the defendant and his attorneys refer to Dr. Dean alternatively as a psychologist and a psychiatrist.

⁶R., p. 74-77.

⁷R., p. 77.

⁸R., p. 72.

⁹R., p. 76-77.

¹⁰Section 425 requires that there be "reasonable ground" to believe the defendant insane. Earlier, the trial judge had denied the motion, observing that counsel had known of the California treatment for over a month and therefore had ample opportunities to present this motion prior to the date the trial was to begin. He apparently reconsidered his ruling and allowed defendant Davis to testify on the matter.

Issues before this court on this appeal concern the effect of the trial court's denial of both motions on defendant's constitutional right to a fair trial. *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975); *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). We first examine the denial of the § 425 motion as that denial related to defendant's alleged incompetence to stand trial. While defendant's appellate counsel admittedly does not pursue this issue with much vigor, instead concentrating on the relation of the § 425 denial to the substantive defense of insanity at the time of the commission of the crime, we nevertheless find that Davis' pro se complaint, liberally read, contains such a claim. We therefore address this issue.

(1) Trial of an accused while he is incompetent violates due process. *Bishop V. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). The Supreme Court has held that the test for determining mental competency to stand trial, as distinguished from the standard to determine mental culpability for the criminal act, itself, is

whether (the defendant) has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.

Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960). This court has held that analysis of the issue of competency is two-fold: first, a defendant has a substantive right not to be tried while he is incompetent;¹¹

¹¹The Supreme Court precluded the possibility of waiver of a claim of incompetence to stand trial in *Pate v. Robinson*, 383 U.S. at 384, 86 S.Ct. at 841, 15 L.Ed.2d at 821 (1966). While it later expressed some

second, pursuant to *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the defendant also has a right to adequate procedures to safeguard this substantive right. *Nathaniel v. Estelle*, 493 F.2d 794 (5th Cir. 1974). The *Nathaniel* panel reached this conclusion after observing that long before *Pate*¹² federal courts recognized as constitutionally mandated the guarantee against standing trial when incompetent. Only with *Pate*, however, could a federal habeas petitioner raise not only incompetence in fact, but also, in a proper case, the trial court's failure to determine competence contemporaneous with trial. *Nathaniel*, 493 F.2d at 796-97. Examining the *Pate* issue first, we shall follow a similar bifurcated approach in our analysis.

(2-4) Essential to a claim that the trial court violated one's procedural due process rights, pursuant to *Pate's* mandate, by not determining competence at the time of trial is a showing that the defendant presented evidence raising the issue of competency, *Nathaniel*, 493 F.2d at 797. *Accord*, *Grissom v. Wainwright*, 494 F.2d 30 (5th Cir. 1974). *Tyler v. Beto*, 391 F.2d 993 (5th Cir. 1968) *cert. denied*, 393 U.S. 1030, 89 S.Ct. 642, 21 L.Ed.2d 574 (1969). Obviously, one cannot fault a trial court judge for failing to determine a question that he has no reason to believe is in issue. Yet, the Supreme Court has indicated that an explicitly worded motion for a competency hearing is not the only signal to trigger procedures that provide for a determination of competency. *Pate v. Robinson*, 383 U.S. at 384, 86 S.Ct. at 841, 15 L.Ed.2d at 821; *Drope v. Missouri*, 420 U.S. at 176-177, 95 S.Ct. at 906, 43 L.Ed.2d at 116. *See also Lee v. Alabama*, 386 F.2d 97 (5th Cir. 1967) (*en banc*)

misgivings on the viability of that proposition in *Drope v. Missouri*, the non-waiverability of a claim of incompetence appears to survive in that case. *Drope*, 420 U.S. at 176-177, 95 S.Ct. at 906, 43 L.Ed.2d at 116.

¹²*E. g.*, *Bishop v. United States*, 350 U.S. 961, 76 S.Ct. 440, 100 L.Ed. 835 (1956).

cert. denied, 395 U.S. 927, 89 S.Ct. 1787, 23 L.Ed.2d 246 (1969). Rather, if the defendant has presented evidence to the trial court, before or during trial, that raises a "bona fide doubt," of his competence, *Pate*, 383 U.S. at 385, 86 S.Ct. at 842, 15 L.Ed.2d at 822, the trial court's failure to make further inquiry denies that defendant his constitutional right to a fair trial. While the Supreme Court has not prescribed a general standard regarding the nature or quantum of evidence necessary to require resort to an adequate procedure, it has stated that three factors should be considered. These factors are: existence of a history of irrational behavior; defendant's demeanor at trial, and prior medical opinion. *Drope v. Missouri*, 420 U.S. at 180, 95 S.Ct. at 907, 43 L.Ed.2d at 118. Examining the present case in light of the considerations discussed above, we note that the defense never raised the issue of competency either prior to or during the trial. While the defense attorneys did make a § 425 motion for a mental examination, this court has held that such a motion, alone, does not place defendant's competence in issue.¹³ *Lee v. Alabama*, 386 F.2d 97 (5th Cir. 1967) (*en banc*). *Accord*, *Seibold v. Daniels*, 337 F.Supp. 210, 214 (M.D.Ala.1972). In addition, the remarks of both the trial judge and defense counsel, as contained in the trial court record, make clear that all parties understood the motion to be directed toward obtaining evidence relevant to defendant's substantive defense of insanity.¹⁴

(5) Having determined that defendant did not raise the issue of competency, we look to the record to determine

¹³In *Lee*, 386 F.2d at 106, this court held that for purposes of determining whether the Alabama trial court had made a finding on the competency of a defendant, its ruling on a § 425 motion would not constitute such a determination. Reciprocally, a § 425 motion, alone, does not place competency into issue.

¹⁴Defendant's appellate counsel conceded this point at oral argument.

if, in light of the three factors listed in *Drope*, indicia suggesting a bona fide doubt as to defendant's competence existed at trial. First, we note that while domestic quarrels occasionally clouded defendant's past, he had no history of irrational behavior such as that uncovered in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815, (1966) or in *Lee v. Alabama*, 386 F.2d 97 (5th Cir. 1967) (*en banc*).¹⁵ While the record indicates that defendant had seen a psychologist, the psychologist's report, indicating that defendant was getting along better with his wife and no longer needed treatment, negates any suggestion of incompetency that one might infer from the fact of his treatment. In addition, lay witnesses, who testified at trial that defendant did not act irrationally or seem incoherent shortly after the crime and during his pre-trial confinement in jail, rebutted any suggestion of "bona fide doubt" about defendant's competence. Finally, defendant's demeanor at the pre-trial hearing on the § 425 motion¹⁶ as reflected through his ability to recite, with great particularity and understanding, facts concerning his family and criminal record, indicated no incompetence on his part. See *McCune v. Estelle*, 534 F.2d 611, 612 (5th Cir. 1976) (no incompetence shown where defendant understood proceedings and able to coherently narrate what had happened in his life as a whole, as well as immediately before trial). Our examination of the trial record, therefore, convinces us that no *Pate* violation occurred through the trial court's failure to *sua sponte* conduct a competency hearing.

(6.7) "A determination that insufficient doubt (of

¹⁵"*Pate* and *Lee* present defendants whose behavior was characterized by amply-attested, frank and extravagant symptoms of derangement: in *Pate's* case, irrational fears, occult and threatening voices, waking visions of snakes and elephants; in *Lee's*, delusions of grandeur and persecution . . . " *Nathaniel v. Estelle*, 493 F.2d at 797.

¹⁶Defendant did not testify at trial, although the record indicates no evidence that he acted incompetently at that proceeding.

competence) existed . . . at the time of trial does not preclude a postconviction inquiry into competence to stand trial." *Nathaniel v. Estelle*, 493 F.2d at 798.¹⁷ Although he cannot argue that the trial court's failure to invoke appropriate procedures violates his rights to due process, the defendant still may prevail if, at habeas, he can show that he nevertheless was incompetent to stand trial. To determine this second question, the *Nathaniel* panel adopts the guideline articulated by Judge Gewin in *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973):

Courts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally, and clearly generate a *real, substantial, and legitimate doubt* as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial. . . (T)he standard which should be met to sustain such a claim (is) a history of mental illness, substantial evidence of mental incompetence at or near the time of trial supported by the opinions of qualified physicians and the testimony of laymen. *The burden is on the petitioner to prove his allegations; such proof shall be clear and convincing.*

Id. at 1043 (emphasis added). Examining the state court record and pleadings before the district court on habeas, petitioner's allegations do not meet this threshold requirement. The facts before the trial court that were potentially relevant to competency¹⁸ clearly do not satisfy

¹⁷"*Pate* did not disturb that right but sought only to diminish the occasions for such determinations by requiring an inquiry contemporaneous with trial if a bona fide doubt then existed." *Nathaniel*, 493 F.2d at 798.

¹⁸Dr. Dean's report, defendant's demeanor at trial, testimony of lay witnesses.

the *Bruce* standard. Petitioner's only other factual allegation to the district court was the existence of a report by a clinical psychologist, Dr. Verna Wool, presumably made during the first months of petitioner's sentence on this conviction.¹⁹ Introduced as Petitioner's Exhibit E, the report merely records the essence of an interview with petitioner concerning his history of domestic problems. Dr. Wool never addresses the issue of petitioner's present or past competency or insanity and none of her comments, even if accepted as true, raise a "real, substantial, and legitimate doubt" as to defendant's competency.²⁰ Given petitioner's failure to present allegations that, even if accepted as correct, meet the *Bruce* requirements, the district court did not err in dismissing, without an evidentiary hearing,²¹ petitioner's habeas petition, at least

¹⁹Petitioner enclosed this report as Exhibit E, without making clear the circumstances under which it was made. Dr. Wool dated the report August 26, 1974.

²⁰In the main, Dr. Wool discusses petitioner's transvestite behavior and his passive relationships with his wives.

²¹Appellant's counsel argues that the district court violated the holding in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963) that requires a federal court in habeas corpus to hold an evidentiary hearing when, in a factual dispute, the state court has not found the relevant facts in a full and fair evidentiary hearing. That requirement does not apply to the competency issue here. With respect to the *Pate* requirement that the trial court hold a competency hearing whenever defendant raises a bona fide doubt as to his competency to stand trial, our examination focuses on the facts known to the trial court at the time of trial. Those facts are not in dispute; only the inferences to be drawn from those facts are contested. Those inferences being constitutionally guided by *Pate* and its progeny, no state evidentiary hearing was required. Likewise, with regard to the substantive issue of competence, we have determined that the factual allegations contained in appellant's petition, even if accepted as true, do not meet any test that this circuit has established as a threshold requirement that a claim of incompetency must satisfy; neither the "substantial allegations" language of *Lee*, 386 F.2d at 97, the "bona fide" doubt test of *Pate* and progeny—e. g. *Grissom v. Wainwright*, 494 F.2d 30 (5th Cir. 1974), *Jordan v. Wainwright*, 457 F.2d 338 (5th Cir. 1972); or the "real, substantial and legitimate doubt" standard of *Bruce*, 483 F.2d at 1043.

as that petition calls into question petitioner's competency.

(8) Defendant's appellate counsel argues primarily that the trial court's denial of the § 425 motion was improper in that it foreclosed appropriate inquiry about defendant's criminal responsibility at the time of the commission of the crime; i. e., appellant's substantive defense of insanity. A problem with appellant's argument however, clearly exists. That is, in order to receive habeas corpus relief pursuant to 28 U.S.C. § 2254, the petitioner must establish that the state court violated a federal constitutional right. Yet, while appellant's counsel discusses at great length the constitutional requirement that a defendant be competent to assist in his defense, he cites us to no relevant authority that requires, as constitutionally mandated, any procedure to determine criminal responsibility similar to that provided for in § 425.²² Instead, he concentrates on the impropriety of the § 425 denial in terms of Alabama law. The Alabama Criminal Court of Appeal, however, determined that the trial court's denial of that motion accorded with relevant

²²Although the issue has not been extensively addressed, various courts have examined the state's responsibility to appoint a psychiatrist to assist an indigent defendant in terms of that defendant's constitutional right to the effective assistance of his counsel. *E. g.*, *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974) (this court has long recognized critical interrelation between expert psychiatric assistance and minimally effective counsel) *United States v. Taylor*, 437 F.2d 371, 383-84 (4th Cir. 1971) (while Supreme Court declined to declare such rights in *Baldi*, underpinning of that case eroded by later court decisions expanding right to counsel); *Davis v. United States*, 413 F.2d 1226, 1229 n. 5 (5th Cir. 1969) (dictum) (Government may be constitutionally required to afford indigent access to psychiatric testimony when he raises an insanity defense and is otherwise unable to procure evidence); *Bush v. McCollum*, 231 F.Supp. 560 (N.D.Tex.1964) (effective assistance of counsel requires that indigent previously adjudicated insane be appointed psychiatrist), *aff'd sub nom.*, *McCollum v. Bush*, 344 F.2d 673 (5th Cir. 1965). *Contra United States ex rel. Huguley v. Martin*, 325 F.Supp. 489 (N.D.Ga.1971). Appellant's counsel does not, however, make this argument and we do not consider it in this appeal.

state law; we accept their determination.

(9,10) The final allegation of error contained in defendant's *pro se* complaint was the failure of the trial court to grant counsel's motion for a continuance to better prepare themselves to defend Davis. In its order denying Davis' habeas petition, the district court merely noted that the trial court's denial of defendant's motion for a continuance did not rise to constitutional dimensions. We are aware that the matter of continuance is traditionally within the discretion of the trial court and that not every denial of such a motion violates one's due process rights or renders ineffective the assistance of his counsel. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). See also *United States v. Miller*, 513 F.2d 791 (5th Cir. 1975). On the basis of the particular facts in this case,²³ we conclude that petitioner raises a substantial claim of ineffective assistance by counsel. Cf., *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967) (with expanding right to effective counsel, continuance should have been granted to allow attorney to prepare his case adequately). Yet, the district court dismissed this contention without holding an evidentiary hearing. No full and fair hearing on this matter having been held in state court, *Townsend's* requirement of a hearing in the district court applies. See also *Barker v. Wainwright*, 459 F.2d 8 (5th Cir. 1972) (where petitioner alleges that defense counsel refused to investigate his case and devoted little time to its preparation, allegations of ineffective assistance of counsel that require an evidentiary hearing are raised). Accord, *Mitchell v. Henderson*, 432 F.2d 435 (5th Cir. 1970);

²³In particular, at trial defense counsel repeatedly asserted that they had not had time to prepare a defense. Indeed, although asserting an insanity defense, defense attorney produced no medical or psychiatric testimony. They called only one witness whose testimony indicated only that defendant appeared to have been drinking when he was arrested for the instant crime.

Hollingshead v. Wainwright, 423 F.2d 1059 (5th Cir. 1970). Accordingly, we remand this part of the complaint to the district court to determine if denial of the continuance deprived petitioner of effective assistance of his counsel.

Affirmed in part, reversed in part.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JAMES G. DAVIS,)
 Petitioner,)
 v.) CIVIL ACTION
STATE OF ALABAMA,) No. 75-A-0803-NE
 Respondent.)

ORDER

In conformity with and pursuant to the Memorandum Opinion of the court contemporaneously filed herewith,

It is ORDERED, ADJUDGED and DECREED the petition of James G. Davis for a writ of habeas corpus be, and the same hereby is, DENIED.

Done, this the 15th day of December, 1977.

G. W. ALLGOOD

SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

JAMES G. DAVIS,)
 Petitioner,)
 v.) CIVIL ACTION
STATE OF ALABAMA,) No. 75-A-0803-NE
 Respondent.)

MEMORANDUM OPINION

This habeas corpus petition is before the court again, having been remanded for an evidentiary hearing by the United States Court of Appeals for the Fifth Circuit. The issue posed for the court on remand is whether the "denial of the continuance deprived petitioner of effective assistance of his counsel."¹

In this Circuit, a motion for continuance is addressed to the sound discretion of the trial court and its ruling will not be disturbed unless there is a showing that there has been an abuse of that discretion. *U.S. v. Uptain*, 531 F.2d 1281 (5th Cir. 1976); *McKinney v. Wainwright*, 488 F.2d 28 (5th Cir. 1974). While the denial of a motion for a continuance may be so arbitrary as to violate due process or the right to effective assistance of counsel, there are no mechanical tests. "The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." (Emphasis added). *Ungar v. Sarafite*, 376 U.S. 575 (1964). In order to be entitled to a continuance, a movant must show that he has exercised due diligence, that the

¹*Davis v. State of Alabama*, 545 F.2d 460, 467 (5th Cir. 1977).

continuance would enable him to procure substantial favorable evidence, and that the denial of the continuance would materially prejudice him. *U.S. v. Miller*, 513 F.2d 791 (5th Cir. 1975).

In view of the foregoing, a review of the motion and the grounds therefor as presented to the trial court is in order. The stated grounds for the motion basically were (1) inadequate opportunity to prepare due to a heavy case load and duty in the legislature; and (2) inopportunity to secure records from the State of California with which to determine the nature of petitioner's mental condition. However, petitioner's counsel admitted that they had been alerted to petitioner's potential mental problems several weeks prior to trial.

The evidence presented to the court consisted of a probation report from a Dr. Dean, a psychologist who had treated petitioner, and the testimony of petitioner himself. Petitioner testified that the only reason for his psychiatric treatment was to regain custody of his children and that based upon Dr. Dean's recommendation, the children were returned to him. Petitioner also admitted that he had a serious drinking problem and a history of alcohol related offenses. Other than Dr. Dean's report, petitioner mentioned no evidence in California which might be obtained if the motion for continuance was granted.

Upon consideration of the showing required of a movant vis-a-vis the actual facts laid before the trial court, the court is of the opinion that the trial court was well within its discretion in denying the motion. Counsel's argument of insufficient time for preparation is without merit. The petitioner's counsel did not, or could not, specify to the trial judge what evidence they hoped to obtain through the continuance or that any such evidence was in fact available. As petitioner's attorney stated in the evidentiary hearing mandated upon this remand, "They

(petitioner's attorneys) in effect told the court then, we have a lead here. We need to run this lead down (p. 10)." The trial judge himself testified in that evidentiary hearing that the motion had been a general one with no specific grounds. Had the attorneys had something specific to present and shown what could have been gained from the continuance, he stated, the motion might have been granted (p. 40-41).

A ruling that the trial judge was within his discretion in denying the motion, however, does not foreclose the possibility that petitioner was denied effective assistance of counsel. Apart from any ruling by the court, neglect on the part of petitioner's attorneys might arguably have denied petitioner the effective assistance of counsel.

The rule in this Circuit with respect to effective assistance of counsel was stated in *MacKenna v. Ellis*, 280 F.2d 592, (5th Cir. 1960); "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and *rendering* reasonably effective assistance. This statement was approved recently in *Haggard v. State of Alabama*, 550 F.2d 1019 (5th Cir. 1977).

While it is true that counsel should have investigated petitioner's mental condition sooner, it does not necessarily follow that through the failure of the counsel to do so, petitioner was denied the effective assistance of his counsel. Mr. Drake, one of petitioner's trial counsel, stated at the evidentiary hearing that up until the trial he did not feel strongly about the insanity plea (p. 57). Certainly this is understandable in light of what little petitioner had told him and of petitioner's alcohol related background. Moreover, petitioner's present counsel does not contend that petitioner's trial attorneys were at fault.

Upon a review of the record as a whole, the court is of

the opinion that petitioner was not denied the effective assistance of his counsel, either from the ruling of the trial judge or the representation of his attorneys. The petition for the writ of habeas corpus therefore must be denied.

This the 15th day of December, 1977.

C. W. ALLGOOD

SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

James G. DAVIS, Petitioner-Appellant,

v.

STATE OF ALABAMA,

Respondent-Appellee.

No. 78-1165.

June 13, 1979.

Rehearing and Rehearing En Banc
Denied Aug. 6, 1979.

State prisoner sought habeas corpus. The United States District Court for the Northern District of Alabama, at Birmingham, Clarence W. Allgood, J., dismissed the petition, and petitioner appealed. Following remand for hearing on issue of effective assistance of counsel, 545 F.2d 460, the Court of Appeals, Goldberg, Circuit Judge, held that: (1) trial defense counsel in murder prosecution did not discharge duty owed to client when they knew that defendant had a history of mental problems and that insanity was his only possible defense and thought that the defendant himself would be of little help in developing the defense, and knew what possible outside sources might be developed, yet made no effort to investigate or develop possible sources of evidence, but (2) further hearing was required to determine whether defendant was prejudiced by failure to adequately

investigate insanity defense.

Reversed and remanded.

Skelton, Senior Judge, sitting by designation, filed a dissenting opinion.

1. Criminal Law § 1151

In examining denial of continuance, Court of Appeals must focus on the reasons presented to the trial judge at the time the request was denied, and recognize that the question is traditionally within the discretion of the trial judge.

2. Criminal Law § 605

State trial judge could not be faulted for denying continuance in murder trial which defense counsel sought on the day of trial on grounds that they needed time to develop an insanity defense, where motion was largely unsupported by explanation or evidence and, though defense counsel acknowledged that they had known of defendant's mental problems from the start of their presentation some two months previously, they gave virtually no explanation for failure to get the information or to find an examining doctor sooner.

3. Attorney and Client § 106

Friendship and neighborliness among attorneys must not be allowed to transcend a lawyer's duty to his client.

4. Criminal Law § 641.13(6)

An attorney who does not provide effective assistance of he fails to investigate sources of evidence which may be helpful to the defense.

5. Criminal Law § 641.13(6)

Trial defense counsel in murder prosecution did not discharge duty owed to client when they knew that defendant had a history of mental problems and that insanity was his only possible defense and thought that

defendant himself would be of little help in developing the defense, and knew what possible outside sources might be developed, yet made no effort to investigate or develop possible sources of evidence.

6. Criminal Law § 641.13(6)

Failure of defense counsel to investigate insanity defense was not offset because defendant himself, who was found competent to stand trial, might have made defense less of a sham by volunteering information.

7. Habeas Corpus § 112

Though defense counsel at state trial failed to discharge duty to client in that they failed to adequately investigate insanity defense, new trial would not be ordered in federal habeas corpus proceeding without a showing of prejudice where it was not known whether attorneys would have uncovered evidence helpful to the defense even if they had acted properly.

8. Habeas Corpus § 85.2(2)

Habeas corpus petitioner would bear burden of proof as to whether he was prejudiced by state trial counsel's failure to investigate insanity defense, but had only to show that attorney's errors were not harmless beyond a reasonable doubt, and could discharge his burden of proof either by showing prejudice or by showing that evidence needed to prove prejudice had been lost.

9. Criminal Law § 1166.11

Not every defendant whose attorney was deficient must show prejudice, and if defense attorney were to put on what amounted to no defense at all, Court of Appeals would not stop to determine whether prejudice resulted, but if attorney has not adequately investigated possible defenses, it will often, though not always, be appropriate to ask whether defendant was prejudiced before ordering a new trial.

B. Don Hale (court-appointed), Cullman, Ala., for petitioner-appellant.

William J. Baxley, Atty. Gen., Carol Jean Smith, Asst. Atty. Gen., Montgomery, Ala., for respondent-appellee.

Appeal from the United States District Court for the Northern District of Alabama.

Before GOLDBERG, Circuit Judge, SKELTON*, Senior Judge, and FAY, Circuit Judge.

GOLDBERG, Circuit Judge:

No one denies that James Davis, the appellant in this case, killed his wife. He pleaded not guilty by reason of insanity—his only possible defense—but a jury in Cullman County, Alabama, convicted him of first degree murder. After unsuccessfully pursuing his state remedies he petitioned for federal habeas corpus. He alleged that there were a number of constitutional errors in his trial. The United States District Court for the Northern District of Alabama dismissed his petition. When Davis appealed, we upheld the district court on several grounds but remanded for an evidentiary hearing to determine if Davis had received the effective assistance of counsel. *Davis v. Alabama*, 545 F.2d 460, 467 (5th Cir.), cert. denied, 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977). On remand a hearing was held before a magistrate, who recommended that Davis be given a new trial. The district judge disagreed and ruled against Davis. Davis appeals again. We reverse because we believe that Davis's trial attorneys failed to discharge their duty to their client. We remand for a further hearing on the question of whether their failure prejudiced Davis.

Approximately two months before his trial, two

*Senior Judge of the United States Court of Claims, sitting by designation.

attorneys were appointed to represent Davis. On the day of trial, they moved for a continuance. They said they needed time to develop an insanity defense. They cited their "heavy caseload" and the duties one of the attorneys had in the legislature. R. Vol. 1 at 73. Since Davis lived in California and was only visiting in Alabama at the time of the crime, see R. Vol. 2 at 27, 62-63, they wanted more time "mainly for the purpose of getting information from the State of California on this question of insanity." R. Vol. 1 at 74. To support their motion for continuance, they adduced only one piece of evidence—the report of a psychologist named Dr. Dean who had recently treated Davis in California. They acknowledged, however, that they had known of Dr. Dean's treatments for several weeks, R. Vol. 1 at 68-69, 70-71,¹ and in addition the report principally discussed Davis's alcoholism. The trial judge denied the motion for a continuance and the case immediately proceeded to trial.

At trial Davis's attorneys put on only the shell of an insanity defense. In Alabama, a variety of evidence can be used to prove insanity; the testimony of lay witnesses and general medical practitioners, as well as that of experts, is admissible. See e. g., *Hamilton v. State*, 281 Ala. 448, 203 So.2d 684, 686-87 (1967); *Smith v. State*, 263 Ala. 1, 82 So.2d 296 (1955). And while the record is unclear, it suggests that a considerable amount of evidence might have been used in support of Davis's insanity plea.² But Davis's trial attorneys called exactly one witness—the *sheriff* who arrested him. He testified that Davis often seemed "quite—fairly strange." The defense attorneys called no other lay witnesses. They called no medical witnesses, even though general practitioners, at least, were readily available in

¹In any event, the trial judge apparently refused to consider this report because it was not properly authenticated. R. Vol. 1 at 74.

²See p. 1221 & n. 14 *infra*.

the area. See R. Vol. 1 at 83-84, 326.³ All of this is undisputed, and it requires us to suspect at once that Davis has not received anything approaching the effective assistance of competent counsel. See *Hintz v. Beto*, 379 F.2d 937 (5th Cir. 1967). See also *Greer v. Beto*, 379 F.2d 923, 925 (5th Cir. 1967); *McCollum v. Bush*, 344 F.2d 672 (5th Cir. 1965).

(1,2) Indeed, even Davis's trial lawyers agreed that their representation of Davis was ineffective. They blamed the trial judge's refusal to grant a continuance for their deficient performance. But when we examine the denial of a continuance we must focus on "the reasons presented to the trial judge at the time the request is denied," *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 850, 11 L.Ed.2d 921 (1964); see *United States v. Uptain*, 531 F.2d 1281, 1285-86 (5th Cir. 1976); *McKinney v. Wainwright*, 488 F.2d 28, 29-30 (5th Cir.), cert. denied, 416 U.S. 973, 94 S.Ct. 1998, 40 L.Ed.2d 562 (1974), and recognize that the question is traditionally within the discretion of the trial judge, see *Ungar v. Sarafite*, 84 S.Ct. at 850; *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940). Davis's defense attorneys' motion for a continuance was so unsupported by explanation or evidence that the trial judge cannot be faulted for denying it. When they made the motion and again at the evidentiary hearing on Davis's federal habeas petition, the defense attorneys acknowledged that they had known of Davis's mental problems from the start. See p. 1218 & n. 8 *infra*. Nevertheless, they gave the trial judge virtually no explanation for their failure to "get () information from

³Apparently they tried to develop the defense by cross-examining some prosecution witnesses. All of these witnesses were local residents; since Davis lived in California and had grown up there, none of these witnesses, as the magistrate noted, would have known about any background of mental illness that Davis had. See R. Vol. 1 at 323 n. 5.

... California" sooner.⁴ They asked the trial judge to appoint a doctor and to allow him time to examine Davis, but they did not explain why they had failed to make that request, or to find a doctor themselves,⁵ during the several weeks they were involved with the case. See R. Vol. 1 at 68, 83, 70.

⁴The defense attorneys urged that one piece of evidence appeared just before the trial and that this evidence caused them to take the insanity defense seriously for the first time. The one piece of evidence—Davis's trial attorneys had some difficulty describing it at the habeas hearing—was apparently that Davis might not have been discharged from Dr. Dean's court-ordered care. R. Vol. 2 at 63-64, 64-65. Significantly, this evidence was barely mentioned when the attorneys moved for a continuance; it made its major debut in the habeas hearing, when the attorneys were pressed to explain their delay. Compare R. Vol. 1 at 70-71, 73-74 with R. Vol. 2 at 46, 48-52. In addition, the trial judge might well have wondered why this evidence was so crucial; if Dr. Dean's treatment itself did not alert defense counsel to Davis's possible insanity, it is difficult to understand why Davis's continuing under the treatment was so significant. In any event, if Davis's attorneys did attach so much importance to their belief that Davis had been discharged from Dr. Dean's care, *Greer v. Beto*, 379 F.2d 923 (5th Cir. 1967)—in which we said that a trial attorney was *prima facie* incompetent because he failed to present evidence of the defendant's insanity two months after a jury found the defendant sane—may suggest that Davis's attorneys' representation was inadequate.

⁵Apparently neither Davis's trial counsel or the attorney appointed to handle his habeas petition has ever argued that Davis's poverty was what prevented him from receiving a psychiatric or even medical examination. See *Davis v. Alabama*, 545 F.2d 460, 466 n. 22 (5th Cir.), cert. denied, 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977). Such an argument would raise an important constitutional question. See, e. g., *McCollum v. Bush*, 344 F.2d 672 (5th Cir. 1965), *affg Bush v. McCollum*, 231 F.Supp. 560 (N.D.Tex.1964). Indeed, we have recently suggested that a court must appoint a psychiatrist to aid the defense of an indigent whose sanity at the time of the crime is "seriously in issue." See *Pedrero v. Wainwright*, 590 F.2d 1383, 1390-91 n. 8 (5th Cir. 1979). But it seems clear from this record that Davis was not examined by a doctor because his attorneys made no effort to have him examined until the day the trial began, see, e. g., R. Vol. 1 at 83, and because they made no efforts, other than proffering Dr. Dean's report, to put Davis's sanity "seriously in issue."

(3-5) Instead of blaming the judge we hold that Davis's trial attorneys were responsible for the inadequacy of Davis's defense.⁶ We have often said that a defense attorney must be prepared to investigate and develop evidence on behalf of his client. "It is the duty of the lawyer

⁶The state suggests that our earlier opinion, *Davis v. Alabama*, 545 F.2d 467 (5th Cir.), cert. denied 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977), forecloses inquiring into the competence of trial counsel. In the last paragraph of that opinion, however, we said that "petitioner raises a substantial claim of ineffective assistance by counsel," and mentioned, among other things, that the "defense attorney produced no medical or psychiatric testimony." *Id.* at 467 & n. 23. We also cited *Mitchell v. Henderson*, 432 F.2d 435 (5th Cir. 1970), and *Hollingshead v. Wainwright*, 423 F.2d 1059 (5th Cir. 1970), both of which involved attacks on the competence of counsel; and we cited *Barker v. Wainwright*, 459 F.2d 8 (5th Cir. 1972), which we described as holding that "where petitioner alleges that defense counsel refused to investigate his case and devoted little time to its preparation, allegations of ineffective assistance of counsel that require an evidentiary hearing are raised." 545 F.2d at 467.

This confusion about the scope of our remand order may result from the actions of the attorney who represented Davis at the habeas hearing. This attorney—who did not represent Davis at trial—virtually stipulated that the trial attorneys were competent. In fact, he apparently could not reiterate often enough that he was not challenging the actions of trial counsel. *See R. Vol. 2* at 4; *id.* at 6; *id.* at 8; *id.* at 9-10; *id.* at 28; *id.* at 43; *id.* at 48-49; *id.* at 67. When Davis, in his testimony at the habeas hearing, suggested that his trial attorneys' conduct of the case may have been deficient, his own habeas counsel reacted by attempting to defend trial counsel and attack Davis. *See R. Vol. 2* at 24-25. At oral argument, the habeas attorney offered this explanation for his actions:

Q. (by Judge Goldberg): Was there any stipulation that Davis's trial counsel was competent?

A. Judge, I think that trial counsel was competent.

.....

A. Judge, I would have to say that I know both these people (Davis's trial attorneys). I practice at the same bar, and they are competent.

Q. You mean they're generally competent.

A. Yes, sir, generally competent, yes, sir.

.....

to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and to a degree of guilt or penalty." American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Functions § 4.1 (tent. draft 1970). An attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense. *See, e. g., Rummel v. Estelle*, 590 F.2d 103, 104-05 (5th Cir. 1979); *Gaines v. Hopper*, F.2d 1147 (5th Cir. 1978); *Bell v. Georgia*, 554 F.2d 1360, 1361 (5th Cir. 1977); *Gomez v. Beto*, 462 F.2d 596 (5th Cir. 1972); *Chalk v. Beto*, 429 F.2d 225, 227 (5th Cir. 1970); *King v. Beto*, 429 F.2d 221, 224 (5th Cir. 1970), cert. denied, 401 U.S. 936, 91 S.Ct. 921, 28 L.Ed.2d 216 (1971); *Caraway v. Beto*, 421 F.2d 636, 637-38 (5th Cir. 1970).

Davis's attorneys made practically no efforts to develop such information. This is undisputed. Davis had relatives in California who might have known, firsthand or secondhand, about his background of mental problems; but as the magistrate found, "(i)t is apparent that . . . defense counsel made no effort prior to the time of trial to secure the testimony of lay persons in California who had had an opportunity to observe irrational acts (by) Davis." *R. Vol. 1* at 326. The attorneys might have written to one of Davis's relatives there.⁷ There is no evidence that

A. Judge, I practice down the hall from (one of the defense attorneys). I am reluctant to say he's incompetent.

Friendship and neighborliness among attorneys are virtues to be admired, but they must not be allowed to transcend a lawyer's duty to his client. Nor can they be allowed to prevent us from doing our constitutional duty to defendants like Davis. For the reasons we elaborate, it seems plain to us that Davis's trial attorneys did not discharge the duty they owed to their client.

⁷At the federal habeas corpus hearing, Davis testified:

From California, and I asked them if they wanted my mother as a witness or my sisters or brothers, and they

they did anything of the sort. Similarly, we would have thought it axiomatic that defense attorneys considering an insanity defense should have their client examined by a psychiatrist or psychologist. In Alabama, as we have said, *see pp. 1215-1216 supra*, even a general practitioner can testify to the defendant's insanity. As the magistrate found: "Any local physician could have been called to testify as to his sanity. Yet the record strongly implies that no effort was made prior to trial to have Davis examined by a physician or to establish facts on which a physician could have based an opinion of Davis' sanity." R. Vol. 1 at 326.

Moreover, it was utterly clear from the start that an effective defense required some investigation. Davis's attorneys knew almost from the time they first met Davis that he was mentally unstable and had a history of mental problems. The district court suggested, *see R. Vol. 1 at 337-38*, that except for Dr. Dean's report the defense attorneys had no evidence indicating that Davis was insane; this suggestion is contradicted by the defense attorneys themselves. At the habeas hearing one of them acknowledged that Dr. Dean's report was "the main thing" but testified:

Q. (D)id you have . . . anything other than this one encounter with Dr. Dean in California?

A. "Yes. We had all kinds of information about him, about problems he had had when he was a kid on up. As a matter of fact, we wanted to go to other cases where he had convictions and where he had been in court before because of problems he had had from it while he was a small kid. As I recall, one where he and his brother took money

wouldn't tell me yes or no until the last day of the trial. I could have got testimony from my brothers and sisters, my mother and father.

R. Vol. 2 at 24.

from the offering plate at a church, for example

R. Vol. 2 at 55-56. This defense attorney—appointed two months before the trial—also testified:

We had known for a month or two that there was some insanity in his background or some problems where he had to see a psychiatrist.

R. Vol. 2 at 46. When they argued for a continuance the defense attorneys cited the facts of the crime itself as evidence of Davis's insanity. R. Vol. 1 at 74. They repeatedly said that their own encounters with Davis convinced them that he had mental problems.⁸

Not only did the defense attorneys know that insanity was a possible defense; they apparently knew that it was Davis's only possible defense. Thus their failure to investigate cannot be excused by saying that it did not seem to be a very strong defense. In deciding not to develop the insanity defense Davis's attorneys effectively decided to put on no defense at all. We cannot say that such an approach amounts to adequate representation. *See Bell v. Georgia*, 554 F.2d 1360, 1361 (5th Cir. 1977); *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972).

In addition, Davis's attorneys knew that he lived in California and had grown up there, so that evidence of his background would likely be found there; they also knew, of course, of the role of medical testimony in an insanity defense, *see R. Vol. 1 at 83*. And they knew—or thought

⁸For example, Davis's trial attorney testified:

"I had known that he had had some mental problems. He had told me, as I recall, that he had."

R. Vol. 2 at 57, and:

"Your Honor, as I stated before, there was something about him that just didn't appear to be right all the way through, and that is the reason, Your Honor, that I asked him if there had been any background of mental problems, because he just didn't appear to be able to talk like a competent person would. And that is when I asked him, and what I asked him, if he had problems, and he said yes, he did."

R. Vol. 2 at 59.

they knew⁹—that Davis himself would not be able to assist them very much in preparing the defense. Davis's trial counsel, discussing his request for a continuance, testified at the habeas hearing: ". . . I was of the opinion that we could gain some additional information if we were allowed to go out there and take depositions. Because just to tell you the truth, Mr. Davis didn't seem competent to me to tell us a lot about himself and his case." R. Vol. 2 at 47. He also testified:

THE COURT: Did (Davis) appear to be able to remember events in his life and to relate those events to you?

A. Your Honor, this is one of the problems that he appeared to have. He just didn't seem to be able to recall a lot of things that had happened in the past.

R. Vol. 2 at 60, and:

THE COURT: Other than his experience with . . . Dr. Dean . . . did he tell you of any other incident in his past?

A. He couldn't remember a lot about them. He had been in and out of trouble so much, he couldn't really remember. I think the major scrapes he had had with the law, he remembered back . . . But he didn't recall all the facts about that.

⁹The matter is not free from doubt; there are some signs that Davis's trial attorneys were as cavalier in eliciting the evidence Davis had as they were in developing other sources. Frequently, for example, Davis's attorneys first learned facts about Davis from the sheriff's office. *See, e.g.*, R. Vol. 1 at 55, 71; R. Vol. 2 at 57. Presumably the sheriff's office learned those facts either from Davis or from pursuing leads that Davis supplied. When communications between a criminal defendant and the sheriff are better than those between the defendant and his attorney, we are entitled to be skeptical about the vigor with which the attorney is seeking evidence.

R. Vol. 2 at 60.

In summary, Davis's attorneys knew that Davis had a history of medical problems, knew that insanity was his only possible defense, knew, or thought, that Davis himself would be little help in developing the defense, knew what possible outside sources might be developed, and—to judge from what they said when they argued for a continuance—knew that without some investigation they had practically no defense to offer. Still they made no effort to investigate or develop the possible sources of evidence. This is not a borderline case; it is a clear breach of the duty a defense attorney owes to his client.

(6) Accordingly, the state's effort to exonerate Davis's attorneys by saying that Davis might have given them more leads, more evidence of his insanity, is mostly irrelevant. Davis's attorneys had a clear duty to investigate and did not fulfill it. That failure is not somehow offset just because Davis himself might have made the defense less of a sham by volunteering information. But the state's suggestion raises larger and more interesting issues. The state and district court seemed to believe that by not informing his attorneys of all the evidence of insanity he knew, Davis had somehow failed in his duty to his attorneys.¹⁰ But eliciting relevant information from the client is a central part of the defense attorney's task. Long ago, for example, the Fourth Circuit held ineffective a defense attorney whose failure to explain a possible defense to his client resulted in the client's not disclosing information which would have established the defense. *See Coles v. Peyton*, 389 F.2d 224, 226-27 (4th Cir.), *cert. denied* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968). In other words, a defendant's failure to disclose certain information to his attorney is not necessarily, or obviously, or even probably the defendant's fault. We must examine the facts

¹⁰*See* R. Vol. 1 at 337-38.

of each case. Even defenses which seem straight-forward to lawyers may be misunderstood by defendants or may be beyond their comprehension.¹¹ Legal insanity, Davis's defense, is an unusually difficult and technical notion, and a defendant cannot be expected to know what facts are relevant to it. For example, Davis told his attorneys about Dr. Dean, who had treated him until he left for his visit to Alabama, but Davis may not have realized that earlier events and treatments were also relevant. We should not hold a defendant responsible for failing to reveal certain information to his attorney unless the attorney has made every reasonable effort to elicit the information, has made his client aware of the sort of information that might be relevant, and has given his client an opportunity to disclose it. We do not know that Davis's attorneys did any of those things.¹²

When a defendant has mental problems, as Davis evidently did, it is even more unrealistic to penalize him for failing to disclose every relevant piece of information to his attorneys. As we have said, see p. 1218 & n. 8 *supra*, Davis's

¹¹A defendant may not even know that insanity—or, for example, self-defense—is a possible defense. He may think that asserting self-defense only provides a motive for a crime; similarly, we may be reluctant to disclose evidence of his insanity for fear that it will become generally known and will incriminate him or increase his sentence.

¹²When Davis was asked whether he had informed his lawyers of one piece of evidence (the Army psychiatrist's report, see footnote 14 *infra*), he said:

"No, they didn't give me a chance to, and like I said, I only seen them twice. And I didn't know what kind of evidence they needed or anything else. And they didn't come up and talk to me or nothing."

R. Vol. 2 at 20. Davis's attorney did testify that he "interviewed (Davis) a number of times and talked with him," R. Vol. 2 at 58, but this testimony was not intended to contradict what Davis said. See also R. Vol. 2 at 15. Davis's attorney did not describe his discussions with Davis; he did not even say whether he had asked Davis questions that were likely to elicit the information that the state accuses Davis of withholding.

apparent mental condition caused his attorneys not to take him seriously as a source of evidence; under those circumstances, it is difficult for us to blame Davis for the information that did not come to light. An attorney who does seriously interview an arguably insane client may find him to be one of those many insane persons who placidly insist that they are entirely sane; and the attorney is likely to find that an arguably insane client is not the best or most reliable source of information. The state suggests that because Davis was found competent to stand trial, he is to be blamed for not disclosing evidence to his attorneys. But not only must we take account of the fact that Davis's attorneys apparently did not interview him very intensively; more generally, a finding that a defendant is competent does not entitle his counsel to act as if the defendant were intelligent, articulate, and learned in the law. An attorney must take account of his client's particular incapacities and weaknesses, and a reviewing court must examine the specific dealings between them.¹³

For these reasons we have no difficulty holding that Davis's attorney, by failing to develop and investigate

¹³In any event, the state's argument begs the question to a significant degree. Davis's attorneys had practically no evidence to present in support of their motion to have Davis declared incompetent. For example, the attorneys themselves did not testify to their difficulties in dealing with Davis; we have indicated that such testimony is important in establishing incompetence to stand trial. See *Pedrero v. Wainwright*, 590 F.2d 1383, 1388 & n. 3 (5th Cir., 1979). Our ruling in this earlier appeal of this case, *Davis v. Alabama*, 545 F.2d 460 (5th Cir.), cert. denied, 431 U.S. 957 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977), was based on only the evidence available to the trial judge and the report of the psychologist who interviewed Davis in prison; that report, we said, "never addresses the issue of petitioner's present or past competency." *Id.* at 465. Moreover, we did not find the defendant competent; we held that he had not "positively, unequivocally, and clearly generate(d) a real, substantial, and legitimate doubt" of his competency by "clear and convincing" evidence. *Id.* (quoting, and adding emphasis to, *Bruce v. Estelle*, 483 F.2d 1031, 1043 (5th Cir. 1973)).

possible sources of evidence, did not discharge their duty to their client. In saying this we do not suggest that Davis's attorneys were generally inept; perhaps they thought that when they told the trial judge of their work load they would be given more time. Perhaps that is the reason they did not try to develop the insanity defense before trial. Perhaps they would have succeeded with another trial judge, but this judge, trying his first case, *see* R. Vol. 1 at 15, insisted on more evidence of insanity and denied the continuance. Perhaps it was all simply a miscalculation. But the defense of this indigent, possibly insane accused did not call for a calculation balancing his rights against the attorneys' convenience. It did not call for brinkmanship with the defendant's only possible defense. It called for thoughtful, thorough preparation and investigation. Instead it received virtually none.

(7,8) Nevertheless we cannot yet order that Davis be given a new trial, because we do not know that his attorneys would have uncovered evidence helpful to his defense even if they had acted properly. The record does suggest, fairly strongly, that some such evidence exists. For example, (1) a clinical psychologist who has examined Davis since his trial reported his "strong latent aggressive feeling" toward women, his "paranoid thinking," and his "schizo-affective disorder," R. Vol. at 36; (2) Davis was discharged from the Army for failing to adjust to military life, *see* R. Vol. 2 at 21, 70, which may suggest psychological problems; (3) after Davis's conviction, and apparently at the request of the attorney who handled his habeas corpus petition, Davis's mother wrote a letter describing some of his irrational behavior. R. Vol. 2 at 11-12; R. Vol. 1 at 325.¹⁴

¹⁴In addition, Davis may have consulted a psychologist or psychiatrist in the Army, R. Vol. 2 at 20-21, and he may have seen an additional psychiatrist, besides Dr. Dean, in civilian life, R. Vol. 2 at 15, 18.

But this evidence has not been critically examined or connected to Davis's condition at the time of the crime.¹⁵ Therefore we remand to the district court for another hearing devoted solely to the question of whether Davis's attorneys misfeasance prejudiced him. At this hearing Davis will bear the burden of proof,¹⁶ but he need only show that his attorneys' errors were not "harmless beyond a reasonable doubt," *see Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, L.Ed.2d 705 (1967). If he makes such a showing, he will be entitled to a new trial on the ground that he has not received the "reasonably effective assistance" of counsel. *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961).

(9) We are dealing with a crucially important right, so our holding on this point is narrow. Not every defendant whose attorney was deficient must show prejudice. The Supreme Court has said that "(t)he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial," *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942), and has held that the denial of counsel at a critical stage of a criminal proceeding is always considered prejudicial. *e. g.*, *Chapman v. California*, 386 U.S. 18, 23 & n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *White v.*

¹⁵For example, Davis might show that the disorders identified by the psychologist who examined him after conviction probably also existed at the time of the crime; or he might show that he was indeed discharged from the Army for psychological reasons. Either of these showings would prove that Davis had been prejudiced by his attorneys' conduct.

¹⁶A habeas petitioner can discharge his burden of proof either by showing that the evidence he needs to prove prejudice has been lost. *See, e. g.*, *McQueen v. Swenson*, 498 F.2d 207, 220 (8th Cir. 1974); *United States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115 (3rd Cir. 1970).

Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963). "That, indeed, was the whole point of *Gideon v. Wainwright*, 372 U.S. 335, (83 S.Ct. 792, 9 L.Ed.2d 799) (1963)." *Chapman v. California*, 386 U.S. at 43, 87 S.Ct. at 837 (Stewart, J., concurring). But "the purpose of *Gideon* was not merely to supply criminal defendants with warm bodies, but rather to guarantee reasonably competent representation," *Cooper v. Fitzharris*, 551 F.2d 1162, 1164 (9th Cir. 1977), so if a defense attorney were to put on what amounted to no defense at all, we would "not stop to determine whether prejudice resulted," *Hamilton v. Alabama*, 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961).

The Supreme Court has gone further than this, however; indeed the Court seems never to have applied the harmless error doctrine to a case involving the ineffective assistance of counsel. *But see Brooks v. Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972). In three recent cases involving ineffective representation the Court pointedly found constitutional violations without inquiring into prejudice. In *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976) *rev'g. United States v. Fink*, 502 F.2d 1 (5th Cir. 1974), the trial court prohibited a defendant from consulting his attorney during an overnight recess that separated the defendant's direct testimony from cross-examination. Because the defendant had shown no prejudice, we held that he had not been denied the effective assistance of counsel, *see* 502 F.2d at 9; the Supreme Court, requiring no showing of prejudice, reversed. In *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), the Supreme Court held that refusing to allow defense counsel to make a closing argument at trial violated the defendant's right to the effective assistance of counsel, even if the issues were simple and the prosecution's case very strong. *See id.* 95

S.Ct. at 2556, 2553. Finally, in *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), the Court held that whenever a trial court improperly permits or requires the same attorney to represent two defendants at a joint trial, "reversal is automatic" even if neither defendant can show specifically that he was prejudiced. *Id.* 98 S.Ct. at 1180-82.

Some circuits have gone further still and have held that a defendant never needs to show prejudice in order to establish that he has been denied the effective assistance of counsel. *See Cooper v. Fitzharris*, 551 F.2d 1162, 1164-65 (9th Cir. 1977); *Beasley v. United States*, 491 F.2d 687, 696-97 (6th Cir. 1974); *but see United States v. Sumlin*, 567 F.2d 684, 688 (6th Cir. 1977), *cert. denied*, 434 U.S. 932 (1978). Other circuits disagree and explicitly require a prejudice to be shown in some cases. *See United States v. Cooper*, 580 F.2d 259, 263 n. 8 (7th Cir. 1978); *McQueen v. Swenson*, 498 F.2d 207, 218-20 (8th Cir. 1973); *United States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115-16 (3rd Cir. 1970); *United States v. DeCoster*, 159 U.S.App.D.C. 326, 333, 487 F.2d 1197, 1204 (1973) (placing burden on government to show lack of prejudice); *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968) (same). *See also United States v. Bosch*, 584 F.2d 1113, 1123 (1st Cir. 1978) (leaving question open).

We have sometimes intimated that a defense attorney's shortcomings vitiate a conviction only if they prejudice the defendant. *See Friedman v. United States*, 588 F.2d 1010, 1016, 1017 (5th Cir. 1979); *Thomas v. Estelle*, 588 F.2d 170, 171 (5th Cir. 1979); *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978); *Pennington v. Beto*, 437 F.2d 1281, 1285 (5th Cir. 1971). *See also Sand v. Estelle*, 551 F.2d 49 (5th Cir. 1977), *cert. denied*, 434 U.S. 1076, 98 S.Ct. 1267, 55 L.Ed.2d 783 (1978); *Cheely v. United States*, 535 F.2d 934, 936 (5th Cir. 1976). All of these cases involved an

attorney's failure to conduct an adequate investigation of possible defenses, and we believe this is decisive. Not every variety of attorney ineffectiveness should be treated in the same way. If an attorney has not adequately investigated possible defenses, it will often, although not always, be appropriate to ask whether a defendant was prejudiced before ordering a new trial.

We reach this conclusion for several reasons. First, a court deciding whether a failure to investigate was prejudicial ordinarily will perform a task to which it is suited. Usually it need only examine the specific evidence that an investigation would have uncovered; it will determine how prospective witnesses will testify and whether certain tangible evidence exists. Affidavits, depositions, or if necessary live testimony will generally be reliable and economical means of deciding the question. By contrast, a court will face a far less congenial prospect if it attempts to decide whether prejudice has resulted from, for example, the kind of ineffectiveness involved in *Holloway*, where an attorney was forced to represent defendants with conflicting interests. Such a court would have to examine the various strategies that the attorney might have pursued and the choices the defendants might have made had they all not been hamstrung by the attorney's conflict; as the Supreme Court noted, this task will often be difficult or "virtually impossible" and would require "unguided speculation," see *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 1181-82 (1978). Similarly, a court would not be well equipped to inquire into the prejudice caused by an attorney's failure to consult sufficiently with his client—a failure which was mandated by the trial judge in *Geders* but might also result from the attorney's dereliction. A court could intelligently evaluate prejudice in such a case only by becoming closely familiar with both the course of the trial and the relationship

between the attorney and the client; then the court would have to put itself in the place of an attorney who was better informed by a client who was better advised, and decide what different decisions that attorney would have made. This will often be a hopelessly intricate task, especially compared to the accumulation of relatively concrete evidence which will be the sole function of the district court on remand here. For this reason, our holding does not conflict with *Holloway* or *Geders*; nor does it require that prejudice be shown before an attorney is held ineffective for representing clients with differing interests or for failing to consult adequately with his client.

Relatedly, a court examining the prejudice caused by an attorney's failure to investigate can, for the most part, avoid speculating about how a jury would have reacted to certain evidence or certain events at trial. See *Sand v. Estelle*, 551 F.2d 49, 51 (5th Cir. 1977), cert. denied, 434 U.S. 1076, 98 S.Ct. 1267 (1978). To be sure, the court will have to decide whether it is satisfied, beyond a reasonable doubt, that the jury's verdict would not have been altered by the evidence presented to it. But this is a threshold inquiry into whether evidence is sufficient to create a question for the jury; it is the sort of inquiry that courts must often make. See generally *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Indeed it is not unlike the question a federal trial judge answers when he decides whether the defendant has adduced enough evidence of insanity to warrant submitting the issue to the jury. See *Davis v. United States*, 160 U.S. 469, 476, 16 S.Ct. 353, 40 L.Ed.2d 499 (1895). By contrast, inquiring into the prejudice resulting from other alleged forms of attorney ineffectiveness will often demand a much more thoroughgoing replication of the jury's function. Thus in *Herring v. New York* the Supreme Court recognized how difficult it is to imagine not just the summation an attorney

would have given, had he been allowed, but the reaction that the finder of fact would have had. *See* 422 U.S. 853, 95 S.Ct. 2550, 2555-56 & n. 15 (1975). The same may sometimes be true of a variety of trial decisions—for example, a decision not to prepare or call a certain witness, not to cross-examine a witness, or not to object to certain evidence, *see e. g.*, *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977)—that reflect deficient performance by an attorney. So those cases, too, like *Herring*, are comfortably distinguishable from the situation we address here. Of course, the facts of each case must be examined; in each case we must assess the advisability of requiring a showing of prejudice. Sometimes, it may be inappropriate to insist that a defendant show prejudice when his attorney has failed to investigate his case adequately; sometimes it will be appropriate to require a defendant to show how he was injured by some other variety of attorney dereliction.

Because we hold that Davis's trial attorneys did not discharge their duty to their client, we reverse the judgment of the district court. The case is remanded for a hearing on the single question of whether the attorneys' conduct prejudiced Davis. If it did, Davis is entitled to a new trial.

REVERSED and REMANDED.

SKELTON, Senior Judge, dissenting.

I respectfully dissent. I cannot agree with much of the reasoning of the majority nor with the result they reach in this case.

This is an appeal from an order of the United States District Court for the Northern District of Alabama, Northeastern Division, entered on December 15, 1977, denying the petition of James G. Davis for a writ of habeas corpus.

Davis, the petitioner herein, was convicted of first-degree murder in the Circuit Court of Cullman County, Alabama, on November 28, 1973, for the murder of his wife. He was sentenced to imprisonment in the state penitentiary for life. After exhausting his state remedies,¹ Davis initiated the instant proceedings by filing this his third petition for a writ of habeas corpus.² Adopting the report of the United States Magistrate and holding no evidentiary hearing, the Honorable C. W. Allgood, United States District Judge, dismissed the petition. Upon appeal of that dismissal, this court affirmed in part and remanded in part, directing the district court to determine if the denial of petitioner's motion for continuance by the state trial court deprived petitioner of effective assistance of counsel. *Davis v. Alabama*, 545 F.2d 460 (5 Cir. 1977). The Supreme Court of the United States denied certiorari. *Davis v. Alabama*, 431 U.S. 957, 97 S.Ct. 2682, 53 L.Ed.2d 275 (1977).

On the prior appeal of this case, this court stated that there were two issues before the court, namely, (1) whether the trial court erred in dismissing that part of petitioner's habeas petition that called into question his competency to stand trial, and (2) whether the trial court erred in denying the motion of petitioner's counsel for a continuance to better prepare themselves to defend him at the trial. (545 F.2d 463).

As to the first issue relating to petitioner's competency at the time of trial, this court found, concluded and held

¹The Court of Criminal Appeals of Alabama affirmed Davis' conviction on October 1, 1974, *Davis v. State*, 53 Ala.App. 598, 302 So.2d 571 (1975). On November 8, 1974, the trial court denied a petition for a writ of error, *coram nobis*; the Court of Criminal Appeals affirmed this judgment on February 18, 1975. Finally, on April 24, 1975, the Alabama Supreme Court denied Davis' petition for a writ of certiorari.

²Davis' first petition was dismissed on December 20, 1974. His second petition was dismissed on June 11, 1975.

that he was competent when the trial was held. The court cited the factors listed by the Supreme Court in *Drope v. Missouri*, 420 U.S. 162, 180, 95 S.Ct. 896, 907, 43 L.Ed.2d 103, 118 (1975), that should be considered to determine competency if the issue is raised, saying:

"While the Supreme Court has not prescribed a general standard regarding the nature or quantum of evidence necessary to require resort to an adequate procedure, it has stated that three factors should be considered: These factors are: existence of a history of irrational behavior; defendant's demeanor at trial, and prior medical opinion. *Drope v. Missouri*, 420 U.S. at 180, 95 S.Ct. at 907, 43 L.Ed.2d at 118. Examining the present case in light of the considerations discussed above, we note that the defense never raised the issue of competency either prior to or during the trial." 545 F.2d 464.

Even though the petitioner did not raise the issue of his competency, the court, nevertheless, considered and disposed of the question, adversely to him, as shown by the following:

"Having determined that defendant did not raise the issue of competency, we look to the record to determine if, in light of the three factors listed in *Drope*, indicia suggesting a bona fide doubt as to defendant's competence existed at trial. First, we note that while domestic quarrels occasionally clouded defendant's past, *he had no history of irrational behavior* such as that uncovered in *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966) or in *Lee v. Alabama*, 386 F.2d 97 (5th Cir. 1967) (en banc). While the record indicates that defendant had

seen a psychologist, *the psychologist's report*, indicating that defendant was getting along better with his wife and no longer needed treatment, *negates any suggestion of incompetency* that one might infer from the *fact of his treatment*. In addition, *lay witnesses, who testified at trial that defendant did not act irrationally or seem incoherent shortly after the crime and during his pre-trial confinement in jail, rebutted any suggestion of 'bona fide doubt' about defendant's competence. Finally defendant's demeanor at the pre-trial hearing on the § 425¹⁶ motion as*

¹⁶"Defendant did not testify at trial, although the record indicates no evidence that he acted incompetently at that proceeding." 545 F.2d 464, 465. (Emphasis supplied). *reflected through his ability, to recite, with great particularity and understanding, facts concerning his family and his criminal record, indicated no incompetence on his part. See McCune v. Estelle*, 534 F.2d 611, 612 (5th Cir. 1976) (no incompetence shown where defendant understood proceedings and able to coherently narrate what had happened in his life as a whole, as well as immediately before trial). Our examination of the trial record, therefore, convinces us that no *Pate* violation occurred through the trial court's failure to *sua sponte* conduct a competency hearing."

The court then stated that a defendant may still prevail if he can show at a post-conviction habeas hearing that he, nevertheless, was incompetent to stand trial. This question was disposed of by the holding of the court in this case that post-conviction evidence did not show that petitioner was incompetent at the time of trial, as follows:

"A determination that insufficient doubt (of competence) existed . . . at the time of trial does not preclude a post-conviction inquiry into competence to stand trial.' *Nathaniel v. Estelle*, 493 F.2d (794) at 798 (5th Cir.). Although he cannot argue that the trial court's failure to invoke appropriate procedures violates his rights to due process, the defendant still may prevail, if at habeas, he can show that he nevertheless was incompetent to stand trial. To determine this second question, the *Nathaniel* panel adopts the guideline articulated by Judge Gewin in *Bruce v. Estelle*, 483 F.2d 1031 (5th Cir. 1973):

'Courts in habeas corpus proceedings should not consider claims of mental incompetence to stand trial where the facts are not sufficient to positively, unequivocally, and clearly generate a *real, substantial, and legitimate doubt* as to the mental capacity of the petitioner to meaningfully participate and cooperate with counsel during a criminal trial . . .

(T)he standard which should be met to sustain such a claim (is) a history of mental illness, substantial evidence of mental incompetence at or near the time of trial supported by the opinions of qualified physicians and the testimony of laymen. The burden is on the petitioner to prove his allegations; such proof should be clear and convincing."

"Id. at 1043 (emphasis added). Examining the state court records and pleadings before the district court on habeas, *petitioner's allegations do not meet this threshold requirement. The facts before the trial court that were potentially relevant*

*to competency*¹⁸ clearly do not satisfy the *Bruce*

¹⁸"Dr. Dean's report, defendant's demeanor at trial, testimony of lay witnesses."

standard. Petitioner's only other factual allegation to the district court was the existence of a report by a clinical psychologist, Dr. Verna Wool, presumably made during the first months of petitioner's sentence on this conviction. Introduced as Petitioner's Exhibit E, the report merely records the essence of an interview with petitioner concerning his history of domestic problems. Dr. Wool never addresses the issue of petitioner's present or past competency or insanity and none of her comments, even if accepted as true, raise a 'real, substantial, and legitimate doubt' as to defendant's competency. Given petitioner's failure to present allegations that, even if accepted as correct, meet the *Bruce* requirement, the district court did not err in dismissing without an evidentiary hearing,²¹

²¹" . . . With respect to the *Pate* requirement that the trial court hold a competency hearing whenever defendant raises a bona fide doubt as to his competency to stand trial, our examination focuses on the facts known to the trial court at the time of trial. These facts are not in dispute; only the inferences to be drawn from those facts are contested. Those inferences being constitutionally guided by *Pate* and its progeny, no state evidentiary hearing was required. Likewise with regard to the substantive issue of competency, we have determined that the factual allegations contained in appellant's petition, even if accepted as true, do not meet any test that this circuit has established as a threshold requirement that a claim of incompetency must satisfy; neither the 'substantial allegations' language of *Lee*, 386 F.2d at 97, the 'bona fide' doubt test of *Pate* and progeny—e. g. *Grissom v. Wainwright*, 494 F.2d 30 (5th Cir. 1974); *Jordan v. Wainwright*, 457 F.2d 338 (5th Cir. 1972); or the 'real, substantial and legitimate doubt' standard of *Bruce*, 483 F.2d at 1043." 545 F.2d 465-466. (Emphasis supplied). petitioner's habeas petition, at least as that petition calls into question petitioner's competency.

Finally, on the competency question, we held on the prior appeal that the trial court acted properly in denying the Section 425 motion of petitioner's counsel that he be given a mental examination.³ In this connection, we held:

"... in order to receive habeas corpus relief pursuant to 28 U.S.C. § 2254, the petitioner must establish that the state court violated a federal constitutional right. Yet, while appellant's counsel discusses at great length the constitutional requirement that a defendant be competent to assist in his defense, he cites us to no relevant authority that requires, as constitutionally mandated, any procedure to determine criminal responsibility similar to that provided for in § 425. Instead, he concentrates on the impropriety of the § 425 denial in terms of Alabama law. The Alabama Criminal Court of Appeals, however, determined that the trial court's denial of that motion accorded with relevant state law; we accept their determination." 545 F.2d 466.

Thus, it is clear that a previous panel of this court found and concluded that the petitioner was competent just before his trial, during his trial, and after his trial was held. This is binding on us. *United States v. Hernandez*, 580 F.2d 188 (5 Cir. 1978), affirmed and remanded for resentencing, 591 F.2d 1019 (5 Cir., *en banc*, 1979). I have dwelt at length on this competency question to dispel once and for all time any notion or speculation that the petitioner was not competent at the time of his trial.

This brings me to a discussion of the second issue that was before this court on the previous appeal, namely,

³Petitioner's counsel were appointed by the court and could hardly have been expected to have such a mental examination made at their own expense after the trial judge refused to order it.

whether the court erred in denying the motion of petitioner's counsel for a continuance to better enable them to prepare his defense. The district court did not hold an evidentiary hearing on this question. We held that the contention of the petitioner in this regard raised a substantial claim of ineffective assistance of counsel, but it was tied to the action of the trial judge in denying the motion of continuance as shown by the remand order. We did not decide this issue, but remanded the case to the district court by issuing the following order:

"Accordingly, we remand this part of the complaint to the district court to determine if denial of the continuance deprived petitioner of effective assistance of his counsel.

"Affirmed in part, reversed in part."

545 F.2d 467.

Much of the difficulty and confusion in the district court on remand, and now in this court in the present appeal, was and is due to the bifurcated wording of the above remand order. As can be seen from the order, it is divided into two queries, namely, (1) the correctness of the denial of the motion for continuance, and (2) the relation of the denial to effective assistance of counsel. The two queries are interrelated and it is difficult to dispose of one without at the same time taking care of the other. No doubt, that is why the district court on remand considered and disposed of both questions when he made the following finding and conclusion after an evidentiary hearing:

"The record as a whole shows that the petitioner was not denied the effective assistance of his counsel either from the denial of the motion for continuance by the trial judge or from the representation he received from his attorneys at the trial."

As to the denial of the motion for continuance, the facts show that it was a general motion with no mention of the existence of specific evidence which was known to exist, and which counsel might develop if given more time, nor the name of any material witness who might testify for the petitioner if time was allowed for counsel to locate him and procure his testimony. Neither did the motion allege what prejudice, if any, would likely result to the petitioner if the motion was denied.⁴ A motion for a continuance is addressed to the sound discretion of the trial court and the exercise of that discretion will not be deemed improper without a clear showing that such discretion has been abused. *Avery v. Alabama*, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1944); *United States v. Uptain*, 531 F.2d 1281 (5 Cir. 1976); *Jackson v. United States*, 330 F.2d 445 (5 Cir. 1964), cert. denied 379 U.S. 821, 85 S.Ct. 42, 13 L.Ed.2d 32 (1964); *United States v. Sahley*, 526 F.2d 913 (5 Cir. 1976). Furthermore, when such an abuse has been alleged, it must be decided on a case by case basis. As the Supreme Court held in *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964):

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. *The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.* *Nilva v. United States*, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415; *Torres v. United States*, 270 F.2d 252 (CA 9th Cir.); cf. *United States v. Arlen*, 252 F.2d 491 (CA 2d Cir.). (376 U.S. 589-90, 84 S.Ct. at

⁴At the evidentiary hearing, Judge Fred Folsom, Circuit Judge of the 32nd Judicial Circuit, State of Alabama, Cullman County, Alabama, who tried the case, testified as follows:

"... they made no showing as to what could be gained from a continuance, and their motion was general, in that they stated they wanted more time to prepare the defense."

850)." (Emphasis supplied).

This court, in *United States v. Uptain*, *supra*, stated that a "particularly common claim is that a continuance was necessary to interview and subpoena potential witnesses," and listed the criteria the court has specifically considered with regard to such cases as follows:

"... (T)he diligence of the defense in interviewing witnesses and procuring their presence, the probability of procuring their testimony within a reasonable time, the specificity with which the defense is able to describe their expected knowledge or testimony, the degree to which such testimony is expected to be favorable to the accused, and the unique or cumulative nature of the testimony. A general rule recently has emerged:

'A movant must show that due diligence has been exercised to obtain the attendance of the witnesses, that substantial favorable testimony would be tendered by the witness, that the witness is available and willing to testify, and that the denial of a continuance would materially prejudice the defendant.'

United States v. Miller, 513 F.2d 791, 793 (5 Cir. 1975). See also *United States v. Cawley*, 481 F.2d 702, 705 (5 Cir. 1973)." 531 F.2d at 1287.

It is clear that petitioner's motion for continuance did not contain any of the necessary criteria required by the above cases. Under these circumstances, the trial judge did the only thing he could do when he overruled the motion. All of the members of the panel on this appeal agree that the trial judge is not to be faulted for denying the motion, and his action in that regard was proper. Accordingly, since the denial of the motion was proper, it could not and

did not, as a matter of law, deprive the petitioner of the effective assistance of counsel. That was the only question remanded to the district court. It has been answered by that court in the negative. The finding and conclusion of the district court, together with our view that the denial of the motion was proper, should end the matter. Obviously, trial counsel could have been effective before the motion was denied, or afterwards, or both. In my opinion, they were effective in both instances under the circumstances in this case, and the finding and conclusion of the district court, on this question is not plainly erroneous, but is supported by substantial evidence, as shown below.

Now, the majority is reversing the decision of the district court by holding that trial counsel did not discharge their duty to their client in connection with his trial. I cannot agree.

At the end of the trial, the petitioner, whom we have held to be competent, did not claim that his trial attorneys did not discharge their duty to him. In fact, just the opposite appears to be true, as he expressed satisfaction with their services. At that time he asked the trial judge to appoint them to appeal his case, all as shown by the following proceedings.

When the jury returned a verdict of guilty of first-degree murder and fixed petitioner's punishment at life imprisonment, the petitioner told the court that he wanted to appeal the case, but that he did not have the money to hire an attorney for the appeal. Whereupon, the court told him that attorneys would be appointed for him. The court asked petitioner *twice* if his trial counsel would be satisfactory with him if they were appointed to appeal his case, and *both times petitioner answered that he was satisfied with them* and that their appointment for the appeal would be satisfactory with him. At that time the following colloquy took place between the court and the

petitioner:

"The Court: The court is going to at this time if it is agreeable with you appoint the two attorneys who have represented you thus far in this case. Mr. Tom Drake and Mr. John Chapman. Now, are these attorneys agreeable with you? Are you satisfied with them to perfect this appeal for you?"

"The defendant: Yes, sir.

.

"The Court: Of course, I have appointed these attorneys for you—Mr. Drake and Mr. Chapman—and you have indicated to the court that you are satisfied with them to perfect the appeal for you?"

"The defendant: Yes."

There is no question but what petitioner's counsel were competent attorneys. His present attorney in this appeal admits and concedes that they were and are competent attorneys.

The present contention of petitioner that his trial counsel did not discharge their duty to him in connection with his trial is a complete reversal of his expressed satisfaction with their services at the end of the trial. It is obvious to me that such an argument is nothing but a hindsight maneuver on his part to get out of prison.

I assume that in remanding the case for a hearing on whether the attorneys' conduct prejudiced the petitioner, the majority has in mind the efforts of trial counsel with reference to petitioner's insanity plea. I would point out that at no stage of the proceedings up to the present time has the petitioner named any witness who would testify that he was insane at the time of the offense, nor what the testimony would be, nor that any such witness is available

and willing to testify and could be produced at a hearing. He has not alleged that his trial attorneys failed to investigate a single lead that he gave them relating to his insanity plea. Thus, it is clear that none of the basic and rudimentary requirements set forth in *United States v. Uptain*, *supra*, and other decided cases are present.

Furthermore, petitioner has not shown any prejudice because of the services of his attorneys. We held in *United States v. Phillips*, 585 F. 2d 745, 747 (5 Cir. 1978) that a showing of prejudice is required for the reversal of a conviction, saying:

(W)e cannot reverse appellant's conviction in the absence of a showing of prejudice. *See United States v. James*, 495 F.2d 434 (5th Cir.), *cert. denied*, 419 U.S. 899, 95 S.Ct. 181, 42 L.Ed.2d 144 (1974); *United States v. Saitta*, 443 F.2d 830, 831 (5th Cir.) *cert. denied*, 404 U.S. 938, 92 S.Ct. 269, 30 L.Ed.2d 250 (1971)."

The record shows that petitioner's trial counsel were active in his defense. Besides filing the motion for continuance, they filed a motion for a mental examination of petitioner under Title 15, § 425, of the Alabama Code, and various other motions. They filed a plea of not guilty by reason of insanity, which had to be filed as a special plea under Alabama law. During the trial they introduced the report of psychologist, Dr. Dean, who had treated petitioner in California.⁵ They examined and cross-examined various witnesses on the insanity issue, including the sheriff, Olin Buzbee, the sheriff's special investigator, G. O. Buckelew, and the petitioner's relatives. At the conclusion of the evidence, his attorneys made arguments to the jury in his behalf on the insanity issue.

⁵See a discussion of the contents of this report in our prior opinion (545 F.2d 465) as quoted above.

They also requested in writing a special charge on insanity and another on intoxication, both of which were denied by the court. However, the court did give the jury a full and complete charge on insanity as a defense. The court also furnished the jury with a special form prepared by counsel on which they could find Davis not guilty by reason of insanity. The court also charged the jury on the law as to first-degree murder and all lesser offenses, including murder by reason of insanity. They fully investigated the *only* lead given to them on the insanity issue by the petitioner, namely the treatment by Dr. Dean and his report. Nothing more could reasonably have been expected of trial counsel, especially in view of the fact they were appointed by the court and were representing a defendant who was competent both before and during the trial. In my opinion, petitioner's trial counsel complied with the requirement of this circuit by rendering reasonably effective assistance to petitioner under the circumstances of this case. Furthermore, in my opinion, the representation which petitioner's appointed trial counsel furnished to Davis fully discharged their duty to him.

The foregoing efforts on the part of trial counsel show that they rendered reasonably effective assistance of counsel on the insanity issue, which seems to be the only issue troubling the majority. This is especially true in view of the holding of another panel of this court in the prior appeal, as quoted above, which is binding on us, that:

- (1) Petitioner had no history of irrational behavior.
- (2) Dr. Dean's report negated any suggestion of incompetency.
- (3) Lay witnesses testified he did not act irrationally or seem incoherent shortly after the crime and while confined in jail.

- (4) Petitioner's demeanor when he testified at the hearing on the § 425 motion showed he was able to recite with great particularity and understanding facts concerning his family and his criminal record. There was no indication of incompetency.
- (5) There was no evidence that he acted incompetently at his trial.
- (6) The trial court did not err in dismissing petitioner's habeas petition which called into question his competency.

545 F.2d 464, 465.

The majority opinion unnecessarily expands and enlarges the doctrine of "effective trial counsel." A defendant is not entitled to "errorless counsel," but only to counsel "reasonably likely to render and rendering reasonably effective assistance."⁶

The "effective assistance of counsel" cases relied on by the majority are distinguishable on the facts from the instant case. Those cases, without discussing them in detail, have, for the most part, a common characteristic or thread running through them, namely, the fact that trial counsel conducted no investigation at all, or, more commonly, failed to investigate specific leads furnished by their clients that were germane to their defenses. That is not the situation here. In our case, the trial attorneys conducted an investigation on their own, and they fully

⁶See *MacKenna v. Ellis*, 280 F.2d 592 (5 Cir. 1960), modified 289 F.2d 928 (5 Cir. 1961), cert. denied, 368 U.S. 877, 82 S.Ct. 121 7 L.Ed.2d 78 (1961), wherein the court held:

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Also, see *Herring v. Estelle*, 491 F.2d 125, 127 (5 Cir. 1974); and *Haggard v. Alabama*, 550 F.2d 1019, 1023 (5 Cir., 1977).

investigated the only lead furnished to them by the petitioner bearing on his insanity defense, namely, the treatment by Dr. Dean and his report. But I gather from the majority opinion that they would require trial counsel to do more, such as travel from Alabama to California, presumably at their own expense, and conduct an investigation of petitioner's life from the time he was 10 years of age to the time he murdered his wife, without any leads furnished to them by their competent client, to try to discover by their own efforts in a widespread "fishing expedition," a witness somewhere, some place, somehow, who might possibly testify on petitioner's insanity defense. I think this is an unwarranted extension of the doctrine of what is required of an attorney "rendering reasonably effective assistance of counsel."

In the instant case, if there was any deficiency in counsel's investigation of petitioner's case, it was caused by failure of their competent client to furnish leads, and not by negligence on the part of counsel.

By hindsight, petitioner now suggests for the first time certain other "leads" which might, or might not, have revealed information favorable to his defense had they been fully investigated. And whereas, the majority finds defense counsel ineffective: (1) for failure to search petitioner's past and uncover these leads for themselves, and (2) for then not fully developing these leads, I would require a competent defendant, such as the petitioner, and indeed find it his duty, to assist his counsel by revealing instances of his past helpful to his own defense.

And lastly, should it be asserted that defense counsel failed to ask the right questions, which I candidly agree may or may not have been the case under the present state of the record, it must be remembered that the burden of proving ineffectiveness of counsel is upon the petitioner. And with regard to the record now before us, if there is any

evidence at all establishing ineffectiveness in this regard, it is clearly not sufficient in my opinion to allow this court to overturn the finding of the district court made after hearing the witnesses and evaluating the evidence at the plenary hearing.

Finally, I would point out that petitioner has already had practically every kind of hearing and trial known to the state and federal courts. His case has been in litigation for seven years. He has practically made a career of it. He has had trials and hearings in all the Alabama state courts, including a trial and a *coram nobis* hearing in the district court, then appeals to the Court of Criminal Appeals, and the Supreme Court. His hearings in the federal courts include three habeas corpus appearances in district courts, two appeals to this court, and an appeal to the Supreme Court of the United States. He has had his day in court many times over. In my opinion, instead of starting the proceedings all over again, it is time petitioner's case is brought to a conclusion and he is made to pay the penalty assessed against him by the jury and the trial court for the heinous crime he committed. This is especially true in view of the overwhelming evidence of his guilt, which the majority admits.

It could be argued that the majority opinion, considered as a whole, along with the wording of the remand order, virtually predicts the outcome of the new hearing on prejudice it requires in the district court. Prejudice must be shown by the facts, and the district judge should have a free hand and be uninfluenced by anything we might say in determining it.

I would affirm the judgment of the district court in denying the writ.

APPENDIX E

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT OFFICE OF THE CLERK

August 6, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-1165 - JAMES G. DAVIS v. STATE OF ALABAMA

Dear Counsel:

This is to advise that an order has this day been entered denying the petition () for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition () for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Sally Hayward
Deputy Clerk

cc: Mr. B. Don Hale
Hon. William J. Baxley
Ms. Carol Jean Smith

APPENDIX F

UNITED STATES CODE TITLE 28

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the grounds that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise

appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to prepresent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one

or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall procure such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.